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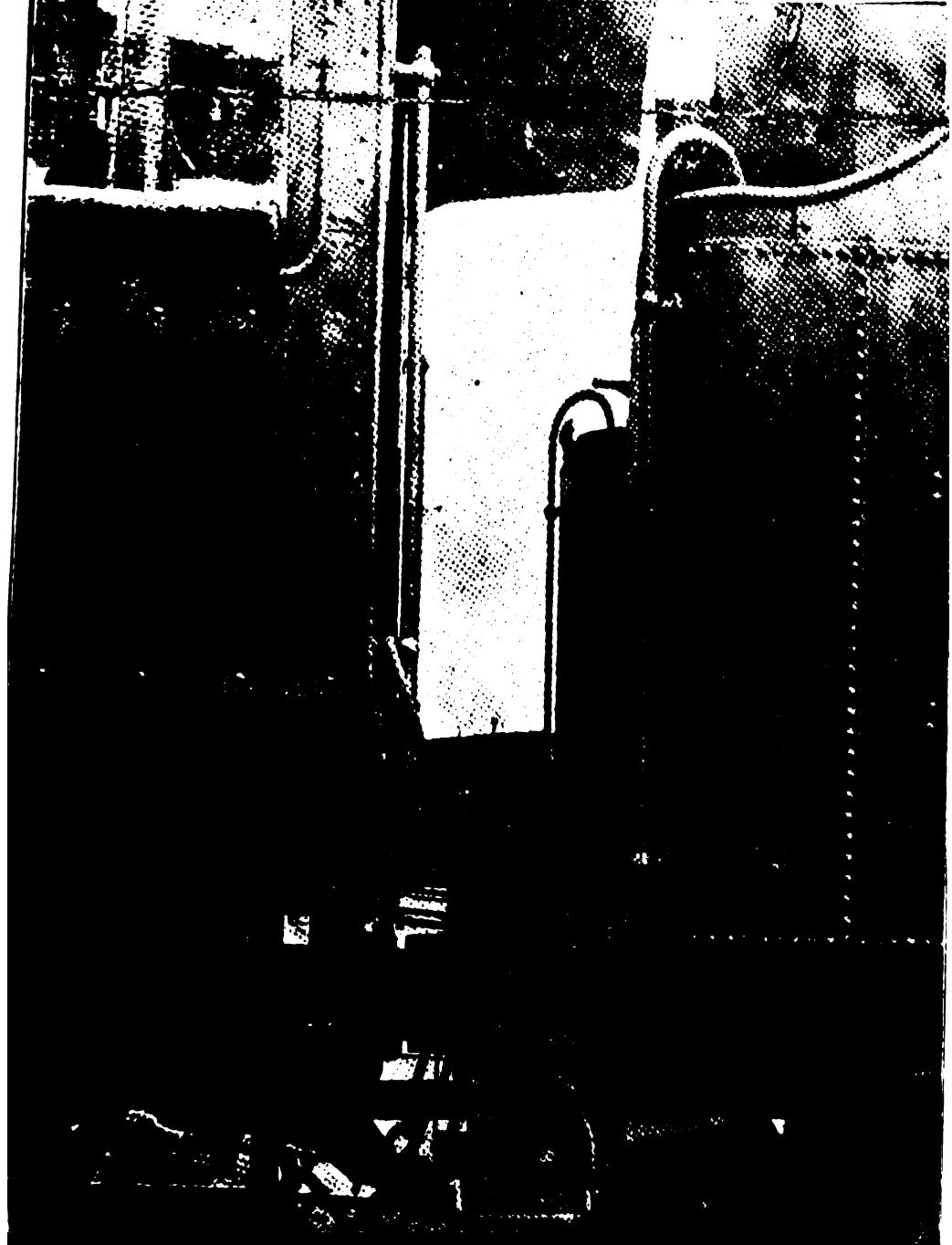
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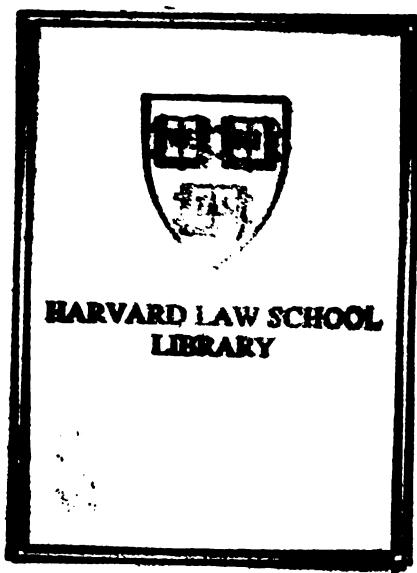
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*Cases Determined by the St. Louis,
Kansas City and Springfield Courts ...*

Missouri. Courts of Appeals



CASES DETERMINED
BY THE
St. Louis, Kansas City and Springfield
COURTS OF APPEALS
OF THE
STATE OF MISSOURI

REPORTED FOR THE
ST. LOUIS COURT OF APPEALS
February 4, 1913 to March 1, 1913.
By THOMAS E. FRANCIS of the St. Louis Bar.

FOR THE
KANSAS CITY COURT OF APPEALS
April 7, 1913 to June 2, 1913.
By JOHN M. CLEARY of the Kansas City Bar.

AND FOR THE
SPRINGFIELD COURT OF APPEALS
April 7, 1913 to June 10, 1913.
By MORRISON PRITCHETT of the Webb City Bar.
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REG. 1

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HON. ALBERT D. NORTONI, }
HON. WILLIAM H. ALLEN, } *Judges.*
 JOSEPH FLORY, *Clerk.*
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HON. JAMES ELLISON, *Presiding Judge.*
HON. JAMES M. JOHNSON, }
HON. FRANCIS H. TRIMBLE, } *Judges.*
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HON. JOHN S. FARRINGTON, }
HON. JOHN T. STURGIS, } *Judges.*
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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1912.

(Continued from Volume 170.)

J. H. PATTON, Respondent, v. ANDREW J. FORGEY AND SARAH J. FORGEY, Appellants.

St. Louis Court of Appeals, February 4, 1913.

1. HIGHWAYS: Prescription: Statute. Sec. 9694, R. S. 1899 (Laws 1887, p. 257), providing that no lapse of time shall divest the owner of his title to the land, unless, in addition to the use of the road by the public for a period of ten consecutive years, there shall have been public money or labor expended thereon, is not retroactive and hence does not affect roads that had been established by prescription prior to its passage.
2. _____: _____. The continued open and adverse use of land for a public road for thirty or thirty-five years prior to the passage of Sec. 9694, R. S. 1899 (Laws 1887, p. 257), established an easement therein as a public road in favor of the public.
3. _____: _____: Conveyance of Land: Rights of Grantee. The owner of land in which the public has an easement as a public road by prescription cannot oust the public of its easement by conveying the land to another, and his grantee takes subject to such easement.

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4. **CONVEYANCES: After-Acquired Title: Estoppel.** Where one conveys land which he does not own at the time, by a deed containing the usual covenant importing an indefeasible seisin, any title subsequently acquired by him inures to the grantee.
5. **HIGHWAYS: Obstruction: Action by Individual.** An individual cannot maintain an action to redress a public wrong, such as the obstruction of a public highway, unless he suffers or is threatened with some special or peculiar injury therefrom.
6. _____: _____: _____. In an action by an individual for the removal of an obstruction to a public highway, plaintiff showed that the obstruction diminished the value of his farm and that the road afforded him a special and peculiar convenience and furnished a shorter route from his land to a certain town than any other road. *Held*, that this evidence established that the obstruction entailed a special and substantial injury upon plaintiff which was not common to others, warranting his maintaining the suit.
7. _____: _____: _____. **Estoppel: Conveyances.** The fact that one who brought suit for the removal of an obstruction to a public highway had previously conveyed the land, over which the highway ran, to defendant by a warranty deed containing a covenant importing an indefeasible seisin would not prevent his maintaining the suit, notwithstanding, in order to maintain it, it was necessary for him to show that he had suffered special injury by the obstruction, since the suit was instituted to maintain a public right.
8. **JUDGMENTS: Final Judgments: Must Dispose of all Parties.** A defendant who is not shown to be liable should be discharged by the final judgment, in view of Sec. 2097, R. S. 1909, which provides that there shall be but one final judgment in the case, and the rule which requires that such a judgment shall dispose of all the parties.
9. **APPELLATE PRACTICE: Rendition of Judgment by Appellate Court: Equitable Proceeding.** Under Sec. 2083, R. S. 1909, appellate courts are authorized to enter such judgments as should have been given by the *nisi prius* court, and especially is this true in an equity case.
10. _____: _____: _____. In a proceeding in equity against two defendants, where one was shown to be liable and the other not liable, and the final judgment failed to discharge the latter, *held* that the appellate court, on finding the record free from error as to the defendant found liable, would affirm the judgment as to him, and would enter a judgment discharging the other defendant and award him his costs.

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Appeal from Louisiana Court of Common Pleas.—
Hon. David H. Eby, Judge.

JUDGMENT MODIFIED.

Frank J. Duvall and Hostetter & Haley for appellants.

(1) A deed containing covenants of general warranty carries with it all the title which the grantor has at the time; and any subsequently-acquired title likewise passes under such a deed, and inures to the benefit of the grantee. Woods v. Smith, 193 Mo. 484; Cockrill v. Bane, 94 Mo. 444; Railroad v. Smith, 170 Mo. 327; Hickman v. Dill, 39 Mo. App. 246; Johnson v. Johnson, 170 Mo. 34; Hume v. Hopkins, 140 Mo. 65; Gibson v. Chouteau's Heirs, 39 Mo. 537. (2) Plaintiff is not entitled to maintain this action because it appears that he did not suffer any special or peculiar injury by reason of such obstructions not shared in by the public and community in general. Bailey v. Culver, 84 Mo. 531; Rude v. St. Louis, 93 Mo. 408; Fairchild v. St. Louis, 97 Mo. 85; Stephenson v. Railroad, 68 Mo. App. 642. (3) There is no finding or adjudication of the issues as to Sarah J. Forgey and no judgment rendered for or against her. This was clearly erroneous, as there should be a judgment for or against each defendant in the case. Spalding v. Bank, 78 Mo. App. 374.

Pearson & Pearson for respondent.

(1) Where obstructions in a public highway directly affect abutting proprietors, the injury is immediate and special, and an action by injunction will lie therefor. Bailey v. Culver, 84 Mo. 531; Schopp v. St. Louis, 117 Mo. 131; Sheppard v. May, 83 Mo. App. 272; Downing v. Corcoran, 112 Mo. App. 645. (2) If either of the defendants were desirous of taking

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advantage of any irregularity in the judgment, in that Sarah J. Forgey's name was not coupled with Andrew J. Forgey's name in the final paragraph of the judgment, it could only have been reached by exceptions saved at the time, or by a motion in arrest of judgment. Spaulding v. Bank, 78 Mo. App. 374; Crow v. Crow, 124 Mo. App. 120; Miller v. Bryden, 34 Mo. App. 612.

NORTONI, J.—This is a suit in equity. Plaintiff sued out an injunction against defendants Forgey and wife, restraining them from further obstructing a public road connecting with his pasture. At the hearing, the court found the issue for plaintiff and decreed a perpetual injunction against defendant A. J. Forgey, but made no disposition of the case whatever as to defendant Sarah J. Forgey. From this judgment defendants prosecute the appeal.

The road in question is a *cul de sac*, which runs to the westward from the public road known as the Gravel road near Paynesville in Pike county, and connects with plaintiff's farm of one hundred and fifty-four acres, in the rear of some adjacent tracts on the outskirts of that town. The evidence tends to prove that this road is about twenty feet in width, but its length does not appear. The main public road, known as the Gravel road, runs north and south through the town of Paynesville and passes over Water street of the town. The road involved in this controversy, said to be twenty feet in width, runs west from the Gravel road between lot sixteen in a certain block of the town of Paynesville, which is situate on the north thereof, and a lot known as the Kreitz lot, immediately on the south of it. After passing between these lots, the road extends farther westward between two tracts of land owned by defendants, and connects with plaintiff's farm beyond. The evidence is well nigh conclusive that this road had been continually in use by the pub-

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lic for a period of about sixty years until defendant obstructed it by placing a wire fence across the same, near the point where it intersects the Gravel road.

It appears that more than forty-five years ago, this road was used by one and all as a passageway to a schoolhouse located on a tract of land now owned by defendant, which is situate to the west and in the rear of lot sixteen. For many years this road served to accommodate several families who resided on the several tracts of land it touched, to the west of Paynesville, and during all of the time it has served to accommodate the farm now owned by plaintiff, by furnishing a short route to Paynesville. The several other tracts are now owned by defendants. Different persons who reside along the road repaired it at times as was needed, by hauling gravel upon it and maintaining a bridge immediately adjacent to where it connects with the main or Gravel road. The adjacent proprietors recognized this way as a road, for during all the years they have set and maintained their fences along the sides of the same accordingly, and every person who desired to has used and occupied the road as a passway to and from the premises adjoining. Indeed, the evidence tending to show a continuous, open and adverse user for a period of about sixty years on the part of the public as to this road is conclusive. No one denies or disputes it. However, the right of plaintiff with respect to the matter is denied because he executed a general warranty deed to defendant A. J. Forgey in 1883, whereby he conveyed lot sixteen above mentioned in the town of Paynesville to defendant A. J. Forgey, and included in the deed a description of the ground adjacent thereto occupied by the road. It was on this strip of ground so described in the deed from plaintiff to A. J. Forgey that defendant obstructed the road by putting wire across the same about a year before the institution of this suit.

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As before stated, the road in question here passed west from the Gravel road between the fences on the south side of lot sixteen and the fence on the north side of the Kreitz lot. Both of these lots are now owned, and have been for many years, by defendants. In 1883 Forgey purchased lot sixteen from plaintiff and plaintiff executed a warranty deed conveying the same to him. This deed further described and purported to convey from plaintiff to Forgey the parcel of ground lying immediately south of lot sixteen and north of the Kreitz lot, which was then, and had been for some thirty or thirty-five years theretofore, occupied by this roadway. Though it appears plaintiff's deed incorporated this strip of ground as if he conveyed it to Forgey, the latter did not inclose it at the time, and the public use continued as before. About fifteen years ago, Forgey constructed a fence along the north side of the Kreitz lot, which was immediately adjacent to and south of the road in question, and ever since that time, until about a year before this suit, when he obstructed it by placing a wire across the same, the road continued open between his two fences—the one fence maintained by him along the south side of lot sixteen and the other fence maintained by him along the north side of the Kreitz lot. About a year before this suit was instituted, Mr. Forgey stretched wire across this lane which he had constructed between his two lots and thus obstructed the further passage of persons over the road through the lane.

Our statute, passed in 1887 (See Laws of Missouri 1887, p. 257; R. S. 1899, sec. 9694), providing that no lapse of time shall divest the owner of his title to the land unless, in addition to the use of the road by the public for a period of ten consecutive years, there shall have been public money or labor expended thereon, is without influence in the case. This road was established through prescription, by the continued open, adverse user by the public long before the stat-

ute was enacted. Obviously that statute is not retroactive, and it therefore appears that a public road obtained along the south side of lot sixteen and along the north side of the Kreitz lot, on the very ground which plaintiff attempted to convey to defendant in 1883, and this is true even though no public money or labor had been expended thereon theretofore. The continued open, adverse user for the purposes of the public road for the period of some thirty or thirty-five years before plaintiff executed the deed in 1883 was sufficient to establish the easement of the public thereon, for the uses and purposes of the public road. [See *Sikes v. St. Louis & S. F. R. Co.*, 127 Mo. App. 326, 105 S. W. 700.] This being true, it is obvious that plaintiff's deed executed in 1883 conveyed nothing with respect to this road to defendant, for even if he owned the land described in the deed and on which the road obtained, he could not oust the easement of the public by a mere conveyance and invest defendant with any right thereto which he did not himself possess.

But it is argued that, by this conveyance, plaintiff divested himself of all right, title and interest in the parcel of ground occupied by the road and that any title which he may have acquired since that time by virtue of a continuous user in passing to and from his farm over this route since 1883 inured to defendant, and that this alone precludes his right to relief here. There can be no doubt that where one conveys lands which he does not own at the time, with the usual covenant importing an indefeasible seisin, as here, as by employing the statutory words of grant, bargain and sell, and the covenants which they imply, any subsequently-acquired title to such lands in the grantor inures to the grantee in the deed. [See *Cockrill v. Bane*, 94 Mo. 444, 7 S. W. 480.] But though such be true, the doctrine is without influence here, for plaintiff acquired no title to this strip of land which he

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did not own at the time of the conveyance and so occupied by the road, by his subsequent use of the same in passing to and from his farm, for the easement of the public continued throughout those years precisely as before. The easement of the public was established many years before plaintiff executed his conveyance to defendant, and that conveyance in no respect impaired the right of the public to the continued use of the strip of land, for it was subject to the burden of the roadway. It may be that if plaintiff were asserting an individual or private right here, as the possessor of a private easement, acquired through user by his since the date of the deed, that his conveyance would preclude him, but, obviously, not so when the easement he enjoys is impressed by a public use and one in which he participates merely as a member of the public.

But it is said that plaintiff is asserting a private right, in that it is essential, to entitle him to relief, that he suffer a special injury, different in kind from that of the public generally, and because of this it is urged his private right should be denied because of the covenants before mentioned. No one can doubt that individuals are not permitted to maintain separate actions or suits, such as this one, to redress a wrong that is public in its nature, unless the individual so complaining suffers or is threatened with some special, particular or peculiar injury growing out of the public wrong. [See 2 Elliott, Roads and Streets (3 Ed.), secs. 850, 850a.] It is said that, "If the nuisance causes special or peculiar injury to an individual, different in kind and not merely in degree from the injury to the public at large, and the injury is substantial in its nature, the individual may have his civil remedy." [2 Elliott, Roads and Streets, sec. 850a. See, also, Rude v. City of St. Louis, 93 Mo. 408, 6 S. W. 257; Bailey v. Culver, 84 Mo. 531; Fairchild v. City of St. Louis, 97 Mo. 85, 11 S. W. 60.] The

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record abounds with evidence tending to prove that the obstruction of this road by defendant entailed a special and peculiar injury upon plaintiff, in that it diminished the value of his farm and prevents his use of a roadway which furnishes a short route from his land to the town of Paynesville. It is true other roads touch his farm, but this affords a special and peculiar convenience at another point and is a short road into the town. Obviously its obstruction entails a special injury to plaintiff not common to others and such injury is substantial in character. The suit is for the abatement of a public nuisance and to enforce the removal of an obstruction in a public highway, and in no sense proceeds for the vindication of a private right which is exclusive. The right infringed upon by defendant in placing the obstruction across the roadway, and on account of which relief is sought, is a public right which plaintiff enjoys as a member of the public and not an individual right vested in him to the exclusion of others. From this it appears that, while plaintiff suffers a special injury different in kind from that of the general public, which affords him a right to complain and a standing in court in his own behalf, the purpose of his suit is to vindicate a public right; that is, the right of all of the people to use the road and in which use he is entitled to share because of the fact that he is one member of the public. In this view, it is obvious that the relief should not be denied because of the covenant in plaintiff's deed executed in 1883, for to do so would overlook the public right to an open roadway, which is the basis of the suit, and destroy its force and effect through unduly commingling it with plaintiff's individual right as a landowner suffering special injury through defendant's infringement of the public right or easement to the passway.

We have examined the other questions urged in the brief but do not regard them of sufficient merit to

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warrant discussion in the opinion, except as to the omission of the court to dispose of defendant Sarah J. Forgey in the final judgment.

Mrs. Sarah J. Forgey is a party defendant to the suit and the court acquitted her of all fault in the matter. Indeed, there is no evidence whatever suggesting that she participated in obstructing the roadway. The court found the issue and decreed an injunction against defendant A. J. Forgey alone and made no disposition of the case as to his wife. This was error. The statute (Sec. 2097, R. S. 1909) provides that there shall be one final judgment only in a case and it is the rule that such judgment should dispose of all of the parties. [See Spalding v. Citizens' Bank, 78 Mo. App. 374.] Both defendants have appealed from the judgment and Mrs. Forgey insists she is entitled to her final discharge. The point is well taken.

Under the statute, we are authorized to enter such judgment here as should have been given in the court below and especially is this true in proceedings in equity, as is this one. Therefore the injunction will be decreed perpetual against defendant A. J. Forgey and plaintiff shall recover his costs; that is, one-half of the entire costs of the proceedings against him. As to defendant Sarah J. Forgey, the finding and judgment will be given for her here and she should recover from plaintiff her costs paid out and expended. It is so ordered. Execution will issue accordingly. *Reynolds, P. J., and Allen, J., concur.*

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**BERTRAM J. BUSSIÈRE, Appellant, v. T. M.
SAYMAN, Respondent.**

St. Louis Court of Appeals, February 4, 1913.

1. **APPEALS: Appealable Orders: Setting Aside Default Judgment.** Although section 2038, Revised Statutes 1909, authorizes an appeal from any special order after final judgment, it does not, according to the construction given it by the Supreme Court in *Crossland v. Admire*, 118 Mo. 87, authorize an appeal from an order setting aside a final judgment by default.
2. **—: —: —: Construction of Supreme Court's Decision.** A dismissal by the Supreme Court of an appeal from an order vacating a final default judgment, on the ground that the order is not one granting a new trial within section 2038, Revised Statutes 1909, authorizing an appeal from an order granting a new trial or from any special order after final judgment, is a decision that the order is not appealable under any provision of the statute, and the judgment of the Supreme Court concludes the question of the appealability of such an order.
3. **—: Right to Appeal.** Although the right of appeal is purely statutory, it is nevertheless available to every person who prosecutes one within the terms of the statute authorizing it.
4. **APPELLATE PRACTICE: Supreme Court: Controlling Effect of Decision.** Under section 6 of the Amendment to the Constitution of 1884, providing that the last prior ruling of the Supreme Court shall be controlling authority in the Courts of Appeals, the Courts of Appeals are controlled by the judgment of the Supreme Court directly in point.
5. **—: Conflicting Decisions: Disposition of Case.** Where a decision of one of the Courts of Appeals, conforming to the last prior ruling of the Supreme Court, is in conflict with a decision of one of the other Courts of Appeals, rendered subsequent to the decision of the Supreme Court, the case will be certified to the Supreme Court for final determination, in accordance with the requirements of section 6 of the Amendment to the Constitution of 1884.

**Appeal from St. Louis City Circuit Court.—*Hon.
James E. Withrow, Judge.***

CERTIFIED TO SUPREME COURT.

Charles A. Houts and Frank A. Habig for appellant.

Leahy, Saunders & Barth for respondent.

NORTONI, J.—This is an appeal from an order of the court setting aside a final judgment by default; and the immediate question for consideration pertains to the right of appeal in such cases. The suit is on account for the reasonable value of advertising placed by defendant for plaintiff under a contract.

It appears that defendant was duly summoned more than thirty days before, to answer plaintiff's petition on the first day of the October term, 1910, but he defaulted and came not. Thereafter, and during the October term of court, to-wit, on November 25, 1910, an interlocutory judgment by default was entered against defendant and the cause continued. At and during the succeeding December term, 1910, of the court, and on the 4th day of January, 1911, the cause came on for hearing, and an inquiry of damages was had. Defendant, though duly called, came not, and after the evidence was heard, the court gave judgment for plaintiff for the sum of \$3693.95. Fourteen days thereafter, and during the same, or December, 1910, term of court, and on the 18th day of January, 1911, defendant appeared and by his motion in writing moved the court to set aside the judgment rendered against him. Thereafter, on March 20, 1911, and during the February term, 1911, of the court, to which the motion had been continued, the motion to set aside the judgment was sustained by the court and by its order of record the final judgment entered January 4, 1911 was set aside and vacated.

It is argued by defendant that no appeal lies from an order setting aside a final default judgment, and it is said for that reason this one should be dismissed. We entertain no doubt that the statute authorizes an appeal in this case, but, in view of the decision of the

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Supreme Court in *Crossland v. Admire*, 118 Mo. 87, 24 S. W. 154, we believe the question is concluded here, for, obviously, the identical proposition is within the scope of the judgment of that court in that case. The statute (Sec. 2038, R. S. 1909) authorizing appeals is as follows:

“Any party to a suit aggrieved by any judgment of any circuit court in any civil cause from which an appeal is not prohibited by the Constitution, may take his appeal to a court having appellate jurisdiction from any order granting a new trial, or in arrest of judgment, or order refusing to revoke, modify or change an interlocutory order appointing a receiver or receivers, or dissolving an injunction, or from any interlocutory judgments in actions of partition which determine the rights of the parties, or from any final judgment in the case, or from any special order after final judgment in the cause; but a failure to appeal from any action or decision of the court before final judgment shall not prejudice the right of the party so failing to have the action of the trial court reviewed on an appeal taken from the final judgment in the case. The Supreme Court shall summarily hear and determine all appeals from orders refusing to revoke, modify or change an interlocutory order appointing a receiver or receivers, and for that purpose shall, on motion, advance the same on its docket.”

Among other things, an appeal is authorized by this section “from any special order after final judgment in the case.” It seems entirely clear that these words authorize the present appeal from the order of the court entered after final judgment by default, which operated to set that judgment aside. Such is the view of the Kansas City Court of Appeals on a like question, as will appear by reference to the case of *Miller v. Crawford*, 140 Mo. App. 711, 126 S. W. 984, and in which we fully concur. However this may be, the precise question was before the Supreme Court

in Crossland v. Admire, above cited, which was a case in its material facts like this one, and the appeal there was dismissed by that court when the statute authorizing appeals contained the precise clause as that last quoted.

The clause of the statute authorizing an appeal "from any special order after final judgment in the cause" was first incorporated by an amendment to section 2246, Revised Statutes 1889, approved April 18, 1891, as will appear by reference to the Laws of Missouri of 1891, page 70. Crossland v. Admire was decided by the Supreme Court November 21, 1893, and the opinion expressly comments upon the amendment to section 2246 pertaining to appeals appearing in Laws of Missouri of 1891, page 70. From this it is obvious that the amended statute was before the Supreme Court at the time that judgment was given. It is true that the particular clause authorizing an appeal from any special order after final judgment was not discussed in the opinion in that case, for the court denied the right of appeal on the ground that an order setting aside a default judgment, as in that case and in this one, was not an order granting a new trial to the party. But be this as it may, the right of an appeal, in a case such as this one, under the statute containing the clause mentioned and as it now stands, is essentially within the purview of the *judgment* of the Supreme Court in that case.

Though the right of appeal is purely statutory, it is available to every party who prosecutes one within the terms of the statute authorizing it. The statute then in force (Sec. 2246, R. S. 1889), as amended in 1891 (Laws of Missouri 1891, page 70), authorized an appeal from any special order after final judgment in the cause. It appears that Crossland had obtained a judgment in ejectment by default against Admire, who, though duly summoned more than thirty days before the term, failed to appear to the cause. Fur-

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thermore, final judgment was entered in that case as in this one and the court says: "Before the final judgment was rendered, plaintiff offered evidence of his title, of the possession of defendant, of the value of the rents and profits and of the damages." From this it is obvious that an inquiry of damages was had and such was determined in the final judgment given. After this final judgment was given in *Crossland v. Admire*, defendant appeared by attorney and moved to set the same aside. This motion was sustained and the final judgment by default was set aside, identically as in this case. From that order plaintiff prosecuted his appeal to the Supreme Court and that court dismissed it because it was unauthorized by the statute, and this, too, when the statute stood precisely as it does today on the particular question involved here. While, as before said, the court in that case does not discuss the provision of the statute authorizing an appeal from any special order after final judgment, the question is essentially concluded in so far as this court is concerned by the judgment of the Supreme Court in that case, for the amended statute was before it, as appears from a reference to other provisions thereof in the opinion. [See *Crossland v. Admire*, 118 Mo. 87, 92, 24 S. W. 154.]

• Though it may be that the plaintiff in that case, in response to defendant's motion to dismiss, offered an argument seeking to sustain his right of appeal on a particular ground, the right was available to him under any provision the statute afforded and the burden was on defendant to point out a valid reason for its dismissal. The court seems to have denied the right of appeal in that case on the ground that it was not prosecuted from an order granting a new trial, in the technical sense of that term; but in view of the provision authorizing an appeal from any special order after judgment then in the statute, it is obvious that the *judgment* of the Supreme Court should be

taken to deny the right, even in view of that provision, for every right vouchsafed by the statute touching that matter was available to plaintiff in support of the appeal. This being true, the judgment of the Supreme Court concludes the matter here, even though the particular words of the statute above referred to are not commented upon in the opinion.

By section 6 of the Amendment to the Constitution pertaining to Courts of Appeals, adopted November, 1884 (see R. S. 1909, vol. 1, page 101), it is provided the last previous ruling of the Supreme Court on any question of law or equity shall in all cases be controlling authority in the Courts of Appeals. In view of this, it is our duty to be guided by the judgment of the Supreme Court in *Crossland v. Admire*, *supra*, which appears to be directly in point and is therefore controlling authority. According to that judgment, this appeal should be dismissed; but as we deem the judgment in this case to be contrary to the decision of the Kansas City Court of Appeals in the case of *Miller v. Crawford*, 140 Mo. App. 711, 126 S. W. 984, the case should be certified to the Supreme Court for final determination. Such is the course authorized by the section of the Constitution above referred to and sustained by the precedents in like cases. [See *Judd v. Walker*, 114 Mo. App. 128, 89 S. W. 558; *s. c.*, 215 Mo. 312, 114 S. W. 979; *Casey v. St. Louis Transit Co.*, 116 Mo. App. 235, 91 S. W. 419; *s. c.*, 186 Mo. 229, 85 S. W. 357.] It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

**JOHN J. LANE, Appellant, v. P. J. CUNNINGHAM,
Respondent.**

St. Louis Court of Appeals, February 4, 1913.

1. **EVIDENCE: Inferences.** It is not necessary, in a suit at law, to prove every essential fact by direct evidence, but it is sufficient if such facts can be inferred from other circumstances and facts in evidence.
2. **REAL ESTATE BROKERS: Right to Commissions.** Where a real estate broker is the procuring cause of a sale which was made directly to his customer by the owner, he is entitled to his commission, and neither the fact that he did not communicate to his principal the name of his customer nor the fact that the property was sold for a less amount than he was authorized to sell it for, would defeat his right thereto.
3. **—: Action for Commissions: Case for Jury.** In an action by a real estate broker for commissions in connection with the sale of a building, whether the broker was the procuring cause of the sale *held*, under the evidence, for the jury.

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen, Judge.*

REVERSED AND REMANDED.

Leahy, Saunders & Barth for appellant.

(1) On a demurrer to plaintiff's evidence, every reasonable intendment in favor of plaintiff, to be drawn from the evidence adduced, must be indulged in his favor. *Hamman v. Coal & Coke Co.*, 156 Mo. 232; *Fassbinder v. Railroad*, 126 Mo. App. 563; *Meily v. Railroad*, 215 Mo. 567; *Frick v. St. Louis, Kansas City & Northern Railway Co.*, 75 Mo. 595; *Pauck v. Beef & Provision Co.*, 159 Mo. 467; *Bensiek v. Transit Co.*, 125 Mo. App. 121. (2) If a real estate broker, through his exertions in introducing the purchasers to the own-

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ers, procured a sale of land, he is entitled to his commission, though the final negotiations are conducted without his knowledge by the principal directly with the purchaser.. Sidebotham v. Spengler, 154 Mo. App. 11; Corum v. Arnold, 156 Mo. App. 547; Real Estate Co. v. Epstein, 157 Mo. App. 101; Simmons v. Oretz, 140 Mo. App. 269; Morgan v. Keller, 194 Mo. 663; Lipscomb v. Mastin, 142 Mo. App. 228; Goldsberry v. Eads, 161 Mo. App. 8; Stevens v. Bacher, 162 Mo. App. 284; Cotton v. Meadows, 163 Mo. App. 723.

James P. Maginn and Schnurmacher & Rassieur
for respondent.

Plaintiff was properly nonsuited. While it is true a real estate broker has earned his commission if he is the procuring cause of the sale, though the transaction be concluded directly between the owner and the purchaser, and even though it be concluded on altered terms, yet, to entitle the broker to recover, he must show it was he who brought the parties together. Tyler v. Parr, 52 Mo. 249; Stevens v. Bacher, 162 Mo. App. 284; Real Estate Co. v. Epstein, 157 Mo. App. 106; Sidebotham v. Spengler, 154 Mo. App. 15.

NORTONI, J.—This is a suit by a real estate broker for his commissions. At the conclusion of the evidence on behalf of plaintiff, the court peremptorily directed a verdict for defendant, which was given and judgment entered thereon. From this judgment plaintiff prosecutes the appeal.

It appears plaintiff is a real estate broker and maintains an office as such in the city of St. Louis. Defendant owned a six-story building, situated at Eighth and Lucas streets in the same city, which he desired to sell. Plaintiff had negotiated a sale of other property for defendant several years before and

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had received his commission therefor. The evidence tends to prove that in September, 1903, defendant authorized plaintiff to sell his building at Eighth and Lucas and agreed to pay him the usual commission for services. The price fixed on the property at that time was \$125,000, but this was afterwards modified. Nearly two years afterwards plaintiff learned that the firm of Meyer-Bannerman and Company was in the market for a building of the character of that owned by defendant, and called upon defendant in June, 1905, touching the matter. He did not inform defendant as to whom he sought to sell the property, but did inform him at that time that he had a prospective purchaser for the property. Defendant said, "Well, I am anxious to sell the property. I am asking \$125,000 for it but I will take less. What you want to do is to get me a proposition on the property." Defendant instructed plaintiff to go ahead and get him a proposition on the property and said, "I would just as leave pay you the commission as any one." "If you will sell it, you can get your commission and I will pay it to you." The following morning plaintiff called upon Mr. Isaac Meyer, of the firm of Meyer-Bannerman and Company, and took up the matter of the sale of defendant's property to him or his company. Mr. Meyer accompanied plaintiff to the property and through it. It appears that plaintiff and Mr. Isaac Meyer went to the topmost floor of defendant's building in the elevator and passed down through the building from floor to floor while Mr. Meyer made such an examination as he desired with respect to the same. Mr. Meyer became interested in the property immediately and while yet within the building said to plaintiff, "I am going to buy this property." This occurred on Thursday. Mr. Meyer inquired of plaintiff as to whether or not defendant would accept some other property in exchange and plaintiff told him that he thought defendant wanted cash. Mr. Meyer did not

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submit a proposition to plaintiff but said only, "I am going to buy this property." After some discussion, plaintiff took his leave of Mr. Meyer, but did not call upon defendant nor inform him of the prospective purchaser nor of the likelihood of a sale, for the reason, as he says, that he had no definite proposition from Mr. Meyer to submit. A day or two later plaintiff learned that an architect had been through defendant's building and examined it on Friday, or the day following that on which he interested Mr. Meyer therein. On the following Monday, plaintiff called upon Mr. Meyer to further press the sale of the property, when Mr. Meyer said to him, "John, where have you been the last couple of days?" Plaintiff replied, "Well, Ike, I have been quite a busy man in selling real estate, and I thought it will take some time to digest the proposition at the beginning." To this Mr. Meyer replied, "John, Cunningham (defendant) has been here." Plaintiff asked Mr. Meyer, "Ike, did you tell him we were through the building?" and Mr. Meyer replied, "Well, no, Mr. Maginn, his lawyer, came here and him and Jake (Mr. Meyer's brother, and a member of the same firm) took it up and he said he wouldn't pay a cent for a commission." It was further shown that defendant sold the property to plaintiff's customer, Meyer-Bannerman and Company, on Monday, the first day of July, or within four days after plaintiff first interested Mr. Isaac Meyer in the building, and on which date Mr. Meyer said to plaintiff that he was going to buy the property. The purchase price paid by Meyer-Bannerman and Company was \$101,500 and the evidence reveals that two and one-half per cent is the usual and reasonable commission for a real estate agent for such sales in and about St. Louis. Plaintiff at no time disclosed to defendant that Meyer-Bannerman and Company, the purchaser, or Mr. Meyer, with whom the negotiations were had, was considering the purchase of the property;

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nor did he introduce or produce to defendant in person a purchaser for the property, in the literal sense of those terms.

It is to be gleaned from the record that the court directed a verdict for defendant on the theory that plaintiff was not entitled to recover unless he had disclosed to defendant the name of the purchaser and that defendant, notwithstanding, intermeddled and consummated the sale with full knowledge of the fact that plaintiff had interested the purchaser in the property. We do not accede to this view of the law, for, obviously, a real estate broker may be the procuring cause of the sale even though he has not communicated the name of the purchaser to his principal. In a suit at law, it is not necessary to prove every fact by direct evidence, and the jury may infer substantive facts in the case from other facts and circumstances in evidence. The law is well established to the effect that "If after the property is placed in the agent's hands, the sale is brought about or procured by his advertisement and exertions, he will be entitled to his commissions. Or, if the agent introduces the purchaser, or discloses his name to the seller, and through such introduction or disclosure negotiations are begun, and the sale of the property is effected, the agent is entitled to his commissions though the sale may be made by the owner."

[See *Tyler v. Parr*, 52 Mo. 249, 250, 251; *Bell v. Kaiser*, 50 Mo. 150; *Stinde v. Blesch*, 42 Mo. App. 578; see also *Sidebotham v. Spengler*, 154 Mo. App. 11, 133 S. W. 101; *Weisels, etc. R. E. Co. v. Epstein*, 157 Mo. App. 101, 137 S. W. 326.] All of the authorities declare, in those cases where the sale is actually made by the principal to the agent's customer, after the agent has interested the customer in the property, that the agent is nevertheless entitled to recover his commissions if he is the procuring cause of the sale, and this is true even though the sale was finally consummated by the owner to the agent's cus-

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tomer and without the agent's knowledge. [See authorities *supra*.] In discussing such cases and the principle pertaining thereto, the courts frequently animadver in the opinion upon the fact, when such is the fact, that the agent had produced the purchaser or introduced him to the owner of the property, but such is not an essential element of the right of recovery.

True, many cases present facts of that character and it is therefore proper to treat with them in the opinion. However, all that is necessary, for the agent to recover in cases of this character, is that he shall be the procuring cause of the sale, and he may be such even though the name of the purchaser was not communicated by him to his principal, the seller.

The Supreme Court affirmed this doctrine in *Tyler v. Parr*, 52 Mo. 249, 250, as will appear from the following excerpt from the opinion: "The law is well established, that in a suit by a real estate agent for the amount of his commission it is immaterial that the owner sold the property and concluded the bargain. If, after the property is placed in the agent's hands, the sale is brought about or procured by his advertisement and exertions, he will be entitled to his commissions." [See, also, *Bell v. Kaiser*, 50 Mo. 150.] Numerous cases in our reports go to the same effect, for they declare that if it appears the real estate agent is the procuring cause of the sale, he may recover his commissions therefor, though the sale was finally consummated by his principal, the owner of the property, and though the owner at the time had no knowledge that the agent or broker had interested the purchaser in the property. [See *Goff v. Gibson*, 18 Mo. App. 1; *Millan v. Porter*, 31 Mo. App. 563, 576; see also *Stinde v. Blesch*, 42 Mo. App. 578.]

The mere fact that plaintiff had not communicated the name of Mr. Meyer, or the Meyer-Bannerman Company, the purchaser, for whom he acted, to defend-

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ant is no reason why he should not recover his commissions though the sale was finally consummated by defendant directly to them, if the fact be found that plaintiff was the procuring cause of the sale. Neither does the fact that defendant sold the property at a price less than that at which he had authorized plaintiff to sell it, in and of itself, preclude plaintiff's right to recover, if it be found that plaintiff was the procuring cause of the sale finally consummated by the owner. [Stinde v. Blesch, 42 Mo. App. 578.]

When all of the facts and circumstances in evidence are considered, it is obvious the case was one for the jury, for the evidence not only shows that plaintiff interested the purchaser in the property on Thursday—so much so that he said he intended to buy the property—but it affords a strong inference as well that the purchaser and the owner got together immediately thereafter and concluded the bargain with a view of defeating plaintiff's commissions. On Thursday, in the latter part of June, plaintiff interested Mr. Isaac Meyer in the property and he said he would buy it. On Friday, it is said, an architect examined the building, and on the following Monday the sale was made by defendant to Meyer-Bannerman and Company. During the interim between Thursday and Monday, it appears that both Mr. Cunningham, defendant, and his attorney, Mr. Maginn, had been in consultation with Mr. Meyer, of Meyer-Bannerman and Company, about the sale of this property, and further that Mr. Cunningham's attorney had remarked to Mr. Meyer that no commission would be paid. This remark about a commission suggests a strong inference to the effect that defendant knew of plaintiff's negotiations with the purchaser and that he would probably insist upon a commission. It is entirely clear that the case was one for a jury. The judgment should therefore be reversed and the cause remanded. It is so ordered. *Reynolds, P. J., and Allen, J., concur.*

Leavea v. Railroad.

WILLIAM LEAVEA, Respondent, v. SOUTHERN RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, February 4, 1913.

1. **WITNESSES: Competency: Death of Agent of Corporation: Competency of Survivor to Transaction.** In an action against a corporation for damages resulting from an assault committed by one of its servants, the plaintiff is disqualified from testifying, under section 6354, Revised Statutes 1909, concerning what was said and done by the servant, where, at the time of the trial, the servant is dead.
2. **—: —: Death of Party to Transaction: Construction of Statute.** In applying section 6354, Revised Statutes 1909, effect should be given to its spirit as well as its letter.
3. **—: —: —: —: Actions Ex Delicto.** Section 6354, Revised Statutes 1909, applies to actions *ex delicto* as well as to actions *ex contractu*.
4. **—: —: —: —.** The disability of the surviving party to testify, under section 6354, Revised Statutes 1909, where the other party to the cause of action in issue and on trial is dead, is coextensive with every occasion where such cause of action may be called in question.
5. **APPELLATE PRACTICE: Conflicting Decisions: Certification to Supreme Court.** Where a decision of one of the Courts of Appeals is in conflict with a decision of one of the other Courts of Appeals, the case should be certified to the Supreme Court for final determination, conformably to section 6 of the Amendment of 1884 to Art. 6 of the Constitution.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow, Judge.*

REVERSED AND REMANDED.

CAUSE CERTIFIED TO SUPREME COURT.

Samuel B. McPheeters for appellant.

As the watchman had died in the meantime, plaintiff was disqualified as a witness and should not have

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been allowed to testify as to his transactions and altercations and trouble with the watchman. Darks v. Grocer Co., 146 Mo. App. 254; Carroll v. Railroad, 157 Mo. App. 247; Lieber v. Lieber, 239 Mo. 1; Anderson v. Railroad, 120 S. W. 298.

Frank A. Thompson for respondent; *Guy A. Thompson* of counsel.

The plaintiff was a competent witness. The statutes do not apply to this sort of a suit and the general and universal practice is to allow the plaintiff to testify in this sort of a case. The following case, together with the universal practice, was relied upon by the trial court and by the attorney for the plaintiff. Drew v. Railroad, 129 Mo. App. 459.

NORTONI, J.—This is a suit for damages accrued to plaintiff on account of personal injuries received through an assault upon him by defendant's agent. Plaintiff recovered and defendant prosecutes the appeal.

It appears that while plaintiff was delivering some goods for shipment at defendant's freight depot, he became engaged in a controversy with its watchman there employed. As a result of this controversy, defendant's agent, the watchman, Teague, assaulted plaintiff, inflicting injuries upon him and thus occasioned the damage for which he sues. Because of this assault and the injuries so received, plaintiff prosecuted the suit against the defendant railroad company for damages, on the theory that the watchman represented it and was acting within the scope of his authority at the time of the assault and battery. Since the assault was made, and before the trial, defendant's watchman departed this life. Notwithstanding the prior death of Teague, defendant's watchman, who made the assault and thus created the cause of action,

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plaintiff was permitted, over the objection and exception of defendant, to detail in evidence, at the trial, his version of the controversy and the assault made upon him.

To the offer of this evidence concerning all that was said and done by Teague, defendant's agent and watchman at the time, an objection and exception was interposed, on the ground that Teague, the other party to the cause of action in issue and on trial, was dead. The court overruled the objection and permitted plaintiff to testify, notwithstanding the death of Teague, as though that fact were wholly immaterial. It is urged this was error, and we believe the argument advanced to be a valid one. Though this suit proceeds against defendant railroad company and not against the watchman, it is obvious that it was the acts and assault made by Tegue while acting for defendant that gave rise to the cause of action. According to the theory of the case declared upon and the right of recovery pursued, Teague acted for defendant in assaulting plaintiff and entailing the injuries for which compensation is sought. This being true, of course the act and assault of Teague must be regarded as that of the defendant.

The statute (Sec. 6354, R. S. 1909) provides that "in actions where one of the original parties to the . . . cause of action in issue and on trial is dead, . . . the other party to such . . . cause of action shall not be admitted to testify . . . in his own favor." The authorities universally declare that, in applying this statute, effect should be given to its spirit as well as its letter. [See Carroll v. United Railways Co., 157 Mo. App. 247, 286, 137 S. W. 303.] In a recent case in our Supreme Court it is said the statutory rule is one of evidence and hence the form of the action in which it is invoked is of no consequence in determining whether the rule is applicable. The high purpose of the statute is, first, equality and, sec-

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ond, to close the door to false witness. To this end, it declares that when the lips of one party to the cause of action in issue and on trial are closed by death, then those of the other party thereto shall be closed by the law. [See *Bishop v. Brittain Inv. Co.*, 229 Mo. 699, 723, 129 S. W. 668.] Many have thought that the statute applies to matters *ex contractu* only, but it does not so provide in terms, and in a most recent case our Supreme Court enforced its rule where the particular question in judgment arose *ex delicto*, for the gravamen of that cause and on which the witness was declared to be incompetent to speak sounded in tort, as for fraud and deceit. The purpose was to set aside a judgment procured through an alleged fraud perpetrated on a court in the State of Illinois. [See *Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458.] We believe that the proper view is, that the disability as a witness to the cause of action in issue and on trial, where the other party to that cause of action is dead and the survivor is a party to the suit, is coextensive with every occasion where such cause of action may be called in question. Such was the ruling by the Supreme Court in *Chapman v. Dougherty*, 87 Mo. 617.

The cause of action in issue and on trial here is the wrong perpetrated by defendant railroad company through its agent, Teague, in assaulting and injuring the plaintiff. Generally speaking, the term "cause of action" in substance signifies a plaintiff's primary right and defendant's wrongful violation of that right. [See Pomeroy's Code Remedies (4 Ed.), p. 459, sec. 346, *et seq.*; *Litton v. Chicago, B. & Q. R. Co.*, 111 Mo. App. 140, 149, 85 S. W. 978; *Mellor v. Mo. Pac. Ry. Co.*, 105 Mo. 455, 470, 16 S. W. 849; *Hales v. Raines*, 162 Mo. App. 46, 141 S. W. 917.] The Supreme Court so treated with the words "cause of action" in this statute in *Chapman v. Dougherty*, 87 Mo. 617, 620, as will appear by reference to that opinion. There can be no doubt that plaintiff was permitted to testify fully

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concerning the cause of action involved here and that that cause of action was created by the alleged wrongful act of Teague, defendant's watchman, now dead, who, for the purposes of the case, must be regarded as having assaulted plaintiff in defendant's name and stead. This being true, the inquiry then is: Under the statute, can Teague, who is now dead, be said to be the "other party" to the cause of action? It is true Teague was not made a party to this suit and the case proceeds against his principal, the railroad company, alone. However that may be, the cause of action declared upon came into being because of his act and he alone was qualified to speak thereon for the defendant. Corporations are artificial persons and may speak and act only through their agents. In view of this and to effectuate the purpose of the statute above quoted, the courts have declared the rule that, when a corporation is in fact "other party" to the cause of action under the statute and the agent representing the corporation about the transaction in suit is dead, such agent shall be regarded, for the purposes of the case, as the "other party" and stand in the place of the corporation with respect to the cause of action in issue and on trial. [See *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429.] In this view, it seems that Teague, defendant's watchman, should be regarded as the "other party" to the cause of action here on trial, and that the fact of his death operates to disqualify the plaintiff as a witness, for such rule alone will work the equality which the statute designs with respect to the power of the parties to the cause of action to speak thereon.

We believe the court erred in permitting plaintiff to testify touching the cause of action on trial, and because of that the judgment should be reversed and the cause remanded. However, the Kansas City Court of Appeals has heretofore ruled the identical question otherwise, as will appear by reference to the case of

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Drew v. Wabash R. Co., 129 Mo. App. 459, 107 S. W. 478, and we deem the judgment of this court to be in conflict with that of the Kansas City Court of Appeals in the case above cited. Because of this, the case should be certified to the Supreme Court for final determination, as is the rule under the Constitution. [See Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558; s. c., 215 Mo. 312, 114 S. W. 979; Casey v. St. Louis Transit Co., 116 Mo. App. 235, 91 S. W. 419; s. c., 186 Mo. 229, 85 S. W. 357.] It is so ordered. *Reynolds, P. J., and Allen, J., concur.*

HARRY JEFFREY, Appellant, v. UNION ELECTRIC LIGHT & POWER COMPANY, Respondent.

St. Louis Court of Appeals, February 4, 1913.

1. **ELECTRICITY: Uninsulated Wire: Action for Death: Sufficiency of Evidence.** In an action against an electric light company for the death of a lineman employed by a telephone company, caused by a shock received from a telephone wire which had fallen across a defectively insulated high tension wire maintained by defendant, *held* that the question of defendant's negligence was properly submitted to the jury.
2. _____: _____: _____: **Contributory Negligence: Instructions.** In an action against an electric light company for the death of a lineman employed by a telephone company, caused by a shock received from a telephone wire which had fallen across a defectively insulated high tension wire maintained by defendant, *held* that an instruction which was authorized by the evidence, that if the jury believed from the evidence that the act of decedent in taking hold of the telephone wire, if the jury should find from the evidence that he did take hold of it, was an act that a reasonably prudent person of his age and knowledge would not have done under the circumstances, and that such act directly contributed to his death, the verdict should be for defendant, was a correct instruction.
3. _____: _____: _____: _____: _____. In an action for injuries to an electric lineman, from a defectively insulated

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electric light wire, it is improper to instruct the jury that the mere omission of the lineman to wear rubber gloves or boots precludes his right of recovery as a matter of law.

4. _____: _____: _____: _____: _____. In an action against an electric light company for the death of a lineman employed by a telephone company, caused by a shock received from a telephone wire which had fallen across a defectively insulated high tension wire maintained by defendant, the court instructed that it was decedent's duty to exercise reasonable care for his safety, and if, in attempting to remove the telephone wire, he omitted to take such precautions as a reasonably prudent boy of his age and experience should have taken, and, in the exercise of ordinary care, he could have known of his liability to injury from the cable and that the wearing of rubber gloves and boots would have lessened his peril, and if the jury believed that the wearing of such articles would have been a reasonable precaution for him to have taken for his own safety, and that, knowing of the peril of working without them, he took hold of the wire without taking such precaution, and thereby directly contributed to his own injury, the jury should find for defendant. *Held*, that the instruction was not vulnerable to the objection that it charged that the failure to wear rubber gloves or boots would preclude a recovery as a matter of law, but, on the contrary, it properly submitted that matter to the jury for a finding.

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey*, Judge.

AFFIRMED.

Frederick A. Mayhall for appellant.

(1) When injury or death is caused by coming in contact with such a wire, it is conclusively presumed that the insulation of the wire was defective, and the doctrine of *res ipsa loquitur* applies. *Von Trebra v. Gas Light Co.*, 209 Mo. 659; *Geisman v. Edison El. Co.*, 173 Mo. 678; *Ryan v. Railroad*, 190 Mo. 621; *Young v. Oil Co.*, 185 Mo. 634; *Gannon v. Gas Light Co.*, 145 Mo. 502; *Dolan v. Same*, 145 Mo. 550; 15 Cyc. 471. (2) It is not contributory negligence, as a matter of law, for one to attempt to remove a telephone wire from

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the street, without rubber gloves. Croswell on Electric Law, sec. 251; 2 Joyce on Electric Law (2 Ed.), sec. 607; Warren v. Railroad, 141 Mich. 298; Grimm v. Del. & Atl. Tel. Co., 72 N. J. Law, 276; Rowe v. Tel. Co., 66 N. J. Law, 19; 1 Joyce on El. Law, secs. 446, 449a; Bourget v. City of Cambridge, 156 Mass. 391; Klages v. Mfg. Co., 88 Minn. 458; Fox v. Village of Manchester, 183 N. Y. 141; Hebert v. Ice Co., 111 La. 532; Citizen Tel. Co. v. Thomas, 99 S. W. 879; Guinn v. Del., etc. Co., 72 N. J. Law, 276; Newark E. L. & T. Co. v. McGilverry, 62 N. J. Law, 451; Light Co. v. Orr, 59 Ark. 215; 2 Joyce on Elec. Law (2 Ed.), sec. 607; Croswell on Elec. Law, sec. 251.

Schnurmacher & Rassieur for respondent.

(1) Notwithstanding the strict standard of care imposed upon electric wire using companies in this State, there can be no liability where the injured party was himself guilty of negligence contributing to the injury. Winkelmann v. Light Co., 110 Mo. App. 184; Trout v. Gas Light Co., 151 Mo. App. 207; Clark v. Railroad, 234 Mo. 396; Roberts v. Telephone Co., 166 Mo. 370; Geismann v. Missouri-Edison Electric Co., 173 Mo. 654. (2) The questions of negligence on the part of the company and of contributory negligence on the part of the employee, are ordinarily for the jury to determine, particularly the question of contributory negligence. 2 Joyce on Electric Law (2 Ed.), sec. 663; Geismann v. Missouri-Edison Electric Co., 173 Mo. 654; Trout v. Gas Light Co., 151 Mo. App. 207, 160 Mo. App. 604; Von Trebra v. Gas Light Co., 209 Mo. 648. (3) Whether the failure of deceased to use the rubber gloves, furnished him for just such occasions as when he met his death, constituted contributory negligence, was eminently a question for the jury. Junior v. Light & Power Co., 120 Mo. 79; Trout v. Gas Light Co., 151 Mo. App. 207, 160 Mo. App. 604; Mahan v. Street Railway, 189 Mass. 1.

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NORTONI, J.—This is a suit for damages alleged to have accrued to plaintiff through the negligence of defendant, which, it is said, occasioned the wrongful death of his minor son. The finding and judgment were for defendant, and plaintiff prosecutes the appeal.

Plaintiff is the father of Roy Jeffrey, a youth aged seventeen years, one month and nineteen days, at the date of his death. Plaintiff's son was in the employ of the Bell Telephone Company, and had been for six months, as a wire splicer and inspector, and came to his death while engaged in the line of duty through receiving an electric shock communicated from defendant, Union Electric Light & Power Company's wires by means of a Bell Telephone wire which he held in his hand. The young man had been directed by his foreman to accompany another workman, Burns, to the alley connecting Taylor with Euclid avenues and running east and west between Berlin and Maryland avenues in St. Louis for the purpose of testing the wires of the Bell Telephone Company. The wires of the Bell Telephone Company, in whose employ plaintiff's son was at the time, and those of defendant, Union Electric Light & Power Company, both occupied the same poles on the north side of the alley. There were several cross arms on the poles and it appears that the wires of defendant Union Electric Light & Power Company were made fast to the lower cross arms, while those of the Bell Telephone Company were made fast to the upper cross arms, about three feet above.

A severe rain and windstorm occurred about one o'clock during the day and as a result of this the limb of a tree was cast against a Bell Telephone wire with sufficient force to break it. Upon the breaking of the wire, one end fell to the ground near the center of the alley, while a portion of the wire above rested upon the cable of defendant Union Electric Light & Power

Company. The evidence tends to prove that the insulation was broken and worn off of the cable of defendant company at the point where the telephone wire came in contact with it. While plaintiff's son and his companion were engaged about a telephone pole in another portion of the alley near two o'clock in the afternoon, a gentleman, passing, called their attention to the fact that a telephone wire had been broken by the storm an hour before and one end had fallen to the ground. Decedent thereupon said to his companion that he would go up the alley and investigate the "trouble." It appears that plaintiff's son had been in the employ of the telephone company for several months and was familiar with the danger incident to high electric currents, though it is said no great danger inheres in the handling of electric light wires unless they come in contact with others heavily charged with the current. However, the evidence is that the electric light cable of defendant across which the telephone wire had fallen was a high tension wire and carried an electrical current of 2200 voltage. Such current was dangerous to human life and the evidence reveals that plaintiff's son and all of those engaged in such work were familiar with this fact. Defendant's instructions to plaintiff's son and to all its employees were to treat all wires as live wires and handle them with rubber gloves and to wear rubber boots while so doing. Furthermore, it had furnished the young man and his companion with rubber gloves and rubber boots to wear when handling live wires or wires which suggested danger. The abrasions, or broken insulation, on defendant's cable across which the telephone wire had fallen were open and obvious to one standing upon the ground beneath, for several of plaintiff's witnesses so stated the fact to be and no one denies it. Plaintiff's son approached the broken wire in the alley and was seen to look up at the point where it lay across defendant's

cable before he touched it. After so looking at the crossing of the wires and without putting on rubber gloves or boots, he took the end of the broken telephone wire in his hand and met an instant death by means of the electric current communicated therefrom, which, it is said, passed through him and formed a circuit with the damp earth below.

The evidence abundantly reveals a case of negligence on the part of defendant and the court properly submitted that question to the jury. Indeed, there are no criticisms leveled against the instructions of the court pertaining to the matter of defendant's negligence. The burden of the argument advanced here for a reversal of the judgment is directed against the instruction which submitted the question of plaintiff's contributory negligence to the jury. In view of defendant's experience, though but a youth, and of his knowledge of the danger which inhered in like situations, the evidence tends with great force to suggest that he was careless of his own safety in taking hold of the end of the telephone wire as it rested in the alley and lay across the defendant's defective high tension cable above his head. On this question the court instructed the jury that if it believe from the evidence that the act of plaintiff's deceased minor son in taking hold of the fallen telephone wire, if the jury should find from the evidence that he did take hold of and try to remove it, was an act which a reasonably prudent person of his age, experience and knowledge would not have done at the time and under the circumstances and surroundings shown by the evidence and that such act directly contributed to his death, then the verdict should be for defendant. Obviously this instruction was proper in the circumstances of the case, and it is difficult to perceive the full meaning of the argument directed against it.

However, we believe the argument touching the court's instructions on the question of the contribu-

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tory negligence of the decedent pertains rather to the instruction which treats with the matter of the young man's failure to wear rubber gloves or rubber boots while undertaking a task which suggested danger. As to this question, the court instructed the jury as follows:

"The jury is instructed that it was the duty of plaintiff's deceased son to himself to exercise reasonable care for his own safety, and if you believe under the evidence in this case that he took hold of and attempted to remove the fallen telephone wire, and that in doing so he omitted to take such precautions as a reasonably prudent boy of his age and experience should have taken, and if the jury believe from the evidence that he knew, or if in the exercise of ordinary care in his vocation he would have known of his liability to injury from defendant's wire, and that the wearing of rubber gloves or rubber boots would have lessened his peril, and if the jury believe from the evidence that the wearing of either rubber gloves or rubber boots would have been a reasonable and proper precaution for him to take for his own safety under the circumstances and in his situation, and that knowing the peril of attempting to remove said wire without either rubber gloves or rubber boots, he took hold of same without such precaution and thereby directly contributed to his injury, then the jury will find for the defendant."

It is urged that the court should not tell the jury, as a matter of law, that the mere omission to wear rubber gloves or rubber boots would preclude a right of recovery. The proposition thus advanced may be accepted as entirely sound, for the court did not so instruct. To have thus declared the law would, no doubt, have infringed plaintiff's rights, for such an instruction would amount to a *péremptory* direction of a verdict for defendant. However, the instruction above copied is not open to this criticism, for by it the jury

were informed that if it should be found from the evidence that plaintiff's son knew of his liability to injury and that the wearing of the rubber gloves or rubber boots would have lessened his peril and that the wearing of either such gloves or boots would have been a reasonable and proper precaution for him to take for his own safety under the circumstances and that knowing of such peril he attempted to remove the telephone wire without either rubber gloves or rubber boots and that the failure on his part to wear such gloves or boots directly contributed to his death, then the finding might be for defendant on that score. Instead of telling the jury as a matter of law that the failure on the part of the young man to wear rubber gloves or boots precluded a right of recovery, the instruction submits the question of the decedent's knowledge of the danger and his knowledge that the wearing of such gloves and boots would diminish his peril and that such were reasonable precautions to be taken by one in the circumstances of the case approaching such a highly dangerous task. No one can doubt that an instruction incorporating the elements of that above copied was entirely proper in the circumstances of the case. The courts generally declare that the question here made is one for the jury and the instruction properly submitted it. [See *Trout v. Laclede Gas Light Co.*, 151 Mo. App. 207, 132 S. W. 58; *s. c.*, 160 Mo. App. 604, 140 S. W. 1198; *Mahan v. Newton, etc., Ry. Co.*, 189 Mass. 1.] From a reading of the record it is to be inferred that the jury denied plaintiff's right of recovery on the theory that his son came to his death as a result of his careless act in taking the telephone wire in his hand with full knowledge of the danger and without utilizing such safety appliances as rubber gloves, etc., which it is conceded defendant furnished him for use.

We have examined the other matters urged in the brief for a reversal but do not consider them of suffi-

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cient importance to merit discussion in the opinion. The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, concurs. *Allen, J.*, not sitting.

MARTHA J. DARKS et al., Respondents, v. SCUDERS-GALE GROCER COMPANY, Appellant.

St. Louis Court of Appeals, February 4, 1913.

OPINION OF SPRINGFIELD COURT OF APPEALS ADOPTED.

The opinion of the Springfield Court of Appeals in this case (146 Mo. App. 247) is adopted as the opinion of the court.

Appeal from St. Louis City Circuit Court.—*Hon. Virgil Rule, Judge.*

AFFIRMED.

Jones, Jones, Hocker & Davis for appellant.

Johnson, Houts, Marlatt & Hawes and *W. W. Wood* for respondent.

PER CURIAM.—The appeal in this case was prosecuted to this court, but it was transferred to the Springfield Court of Appeals under the provisions of an Act of the Legislature, approved June 12, 1909. [See Laws of Missouri 1909, p. 396; see, also, Sec. 3939, R. S. 1909.] Afterwards, the Springfield Court of Appeals disposed of the case through an opinion prepared by Judge Gray of that court, which may be found reported under the title of *Darks v. Scuders-Gale Grocer Co.*, 146 Mo. App. 247, 130 S. W. 430. Subsequently the Supreme Court declared the legislative act, which purported to authorize the transfer of cases from one court of appeals to another for hearing and determina-

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tion, to be unconstitutional, as will appear by reference to the cases of State ex rel. Dunham v. Nixon, 232 Mo. 98, 133 S. W. 336; State ex rel. Dressed Beef, etc. Co. v. Nixon, 232 Mo. 496, 134 S. W. 538; State ex rel. O'Malley v. Nixon, 233 Mo. 345, 138 S. W. 342. Because of such ruling of the Supreme Court, the case was thereafter transferred by the Springfield Court of Appeals to this court on the theory that the jurisdiction of the appeal continued to reside here and the proceedings had in the Springfield Court with reference thereto were *coram non judice*.

The case has been argued and submitted here and duly considered. On examination of the several arguments advanced for a reversal of the judgment, we are prepared to concur in the views of the Springfield Court, heretofore expressed thereon, and therefore adopt as the statement of facts and the opinion of this court the opinion above referred to in the same case which, as before said, is reported under the title of Darks v. Scudders-Gale Grocer Co., 146 Mo. App. 247, 130 S. W. 430. For the reasons stated in that opinion, the judgment should be affirmed. It is so ordered. All concur.

STATE OF MISSOURI, Respondent, v. PHILIP
MARKUS, Appellant.

St. Louis Court of Appeals, February 4, 1913.

1. **FOOD: Adulteration: Deceit is Gravamen of Offense.** The gravamen of the offense denounced by section 4841, Revised Statutes 1909, making it a misdemeanor to sell or offer to sell as cider vinegar any vinegar not the legitimate product of pure juice, known as apple cider, or not made exclusively of apple cider, is the deceit practiced upon the buyer with respect to the character of the vinegar sold.
2. _____: _____: _____: **Indictments and Informations: Sufficiency of Information.** An information averring that ac-

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cused "did sell and offer for sale to one . . . one barrel of vinegar labeled and branded as cider vinegar, which was not the legitimate product of pure apple juice and was not made exclusively from apple cider," does not charge an offense under section 4841, Revised Statutes 1909, for the reason that it does not aver that the cider sold was sold "as cider vinegar;" the gravamen of the offense denounced by the statute being the practicing of a deceit upon the buyer with respect to the character of the vinegar sold.

3. **INDICTMENTS AND INFORMATIONS:** Charging Statutory Offenses. Where the indictment or information is based upon a statute denouncing an offense unknown to the common law, it must aver every constituent fact necessary to bring the accused within the statute.

Appeal from St. Louis Court of Criminal Correction.
—*Hon. Wilson A. Taylor*, Judge.

REVERSED AND REMANDED.

E. P. Peers for appellant.

The charge in the information is void because it attempts to embrace two offenses in one count and does not contain sufficient words of the statutes covering either offense to properly inform appellant of the charge or charges against him. Constitution of Mo., art. 2, sec. 22; State v. Hayward, 83 Mo. 304; State v. Barbee, 136 Mo. 440.

Howard Sidener, Prosecuting Attorney, for respondent.

(1) The information is not duplicitous nor repugnant in that it charges two offenses in one count, namely, "did sell and offer to sell," etc. City of Liberty v. Moran, 121 Mo. App. 682; State v. Niehaus, 217 Mo. 344. (2) Nor is the use of the words, in the information, "labeled and branded," nor the words "did contain therein a foreign substance, to-wit, molasses" necessary averments, but may be treated as mere surplusage, leaving the defendant still properly

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charged in the language of the statute. State v. Murphy, 102 Mo. App. 680. (3) A person who keeps or offers for sale any adulterated article prohibited by the statute takes the risk and is presumed to know that the article he offers for sale is not adulterated, and it is not necessary for the indictment or information under such a statute to allege or prove criminal intent or guilty knowledge. 1 Am. & Eng. Ency. Law, p. 744.

NORTON, J.—Defendant was convicted of a misdemeanor and prosecutes this appeal from that judgment. The charge laid against him pertains to the selling of a barrel of vinegar, labeled cider vinegar, to a grocer, which, it is said, was not cider vinegar.

The statute on which the prosecution is based is as follows:

“Any person who manufactures for sale or offers or exposes for sale as cider vingegar, any vinegar not the legitimate product of pure juice known as apple cider, or vinegar not made exclusively of said apple cider, or vinegar into which foreign substances, drugs or acids have been introduced, as may appear on proper tests, shall be deemed guilty of a misdemeanor and, upon conviction thereof, be punished for every offense by fine of not less than fifty dollars nor more than one hundred dollars, and the cost of prosecution, or by imprisonment in the county jail not to exceed ninety days.” [Sec. 4841, R. S. 1909.]

Omitting formal and immaterial portions thereof, the information charges as follows: “That Philip Markus, in the city of St. Louis, on the 10th day of August, 1909, did sell and offer for sale to one Henry Sextro, one barrel of vinegar labeled and branded as cider vinegar, which was not the legitimate product of pure apple juice and was not made exclusively from apple cider.”

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It will be observed that the offense denounced by the statute above quoted, and which this information purports to charge, pertains to the sale or offer for sale "as cider vinegar" any vinegar not the legitimate product of pure juice known as apple cider. Obviously the element of deceit with respect to the character of the vinegar sold is the gravamen of the offense, for the statute is leveled against one who sells or offers or exposes for sale "as cider vinegar" any vinegar, etc. The information fails to charge that defendant sold Sextro a barrel of vinegar "as cider vinegar," but alleges that he sold to one Henry Sextro one barrel of vinegar labeled and branded as cider vinegar. It is clear the information charges no offense against defendant, for though, as alleged, the one barrel of vinegar sold was labeled and branded as cider vinegar, it does not charge that defendant sold the vinegar to Sextro "as cider vinegar." Where the indictment or information is based upon a statute creating the offense—an offense unknown to the common law—it must set forth and charge every constituent fact required by the statute and necessary to bring the accused fully within the statutory provision. [See *State v. Gabriel*, 88 Mo. 631.] Under this statute it is no offense for one to sell to another a barrel of vinegar merely labeled and branded as cider vinegar, but instead he must sell it to him as cider vinegar. It would seem that the element of deceit is of the gravamen of the offense, and unless it is so charged no crime is laid.

For the reasons stated, the information is insufficient and the judgment should be reversed and the cause remanded. It is so ordered. *Reynolds*, P. J., and *Allen*, J., concur.

BENJAMIN A. TRUCHON, Defendant in Error, v.
GEORGE C. MACKEY, Trustee, Plaintiff in
Error.

St. Louis Court of Appeals, February 4, 1913.

1. **MORTGAGES AND DEEDS OF TRUST: Covenant to Pay Taxes:** "Agreed." A provision in a deed of trust, that the mortgagor "has also agreed with the *cestui que trust* to cause all taxes imposed upon the property to be paid within the time required by law," is an express covenant on the part of the mortgagor to pay the taxes; the word "agreed" implying a meeting of the minds or that one binds himself to act or fulfill the agreement.
2. **COVENANTS: How Created.** No particular form of words is necessary to create an express covenant, but any words importing an agreement are sufficient.
3. **MORTGAGES AND DEEDS OF TRUST: Covenant to Pay Taxes: Validity.** A covenant in a deed of trust by which the mortgagor agrees with the *cestui que trust* that he will pay the taxes is valid.
4. **—: Breach of Covenant to Pay Taxes: Power of Trustee to Sell Property.** Where a deed of trust contained a covenant by which the mortgagor agreed to cause all taxes imposed on the property to be paid within the times required by law, and gave the trustee power to sell the property on default in the fulfillment of any of the covenants contained in it, the trustee had power to sell on the failure of the mortgagor to pay taxes imposed on the property at the time they became due and payable, notwithstanding there was no provision in the deed of trust that the entire debt would become due on the failure of the mortgagor to pay taxes.

Error to St. Louis City Circuit Court.—*Hon. James E. Withrow, Judge.*

REVERSED AND REMANDED.

Watts, Gentry & Lee, for plaintiff in error.

- (1) The petition fails to state a cause of action.
- (2) The deed of trust as charged in the petition con-

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tains an express covenant and agreement that the mortgagor shall pay all taxes lawfully assessed against the mortgaged premises. Rumsey v. Railroad, 154 Mo. 215; Cannock v. Jones, 3 Exch. 233; Montford v. Cadogan, 19 Ves. Jr. 635; Bower v. Hodges, 13 C. B. 765. (3) A stipulation in a deed of trust that the mortgagor shall pay all taxes assessed against the mortgaged property, and that in case of default thereof the mortgagee may at his option declare the entire debt due and instruct the trustee under an express power of sale to make a public sale of the premises to satisfy the taxes and debt, is valid and enforceable. *Jones Mortgages* (6 Ed.), secs. 77 and 1175; 27 Cyc. 1254, 1451; Rumsey v. Railroad, 154 Mo. 215; Horrigan v. Wellmuth, 77 Mo. 542; Gooch v. Botts, 110 Mo. 419; Phillips v. Bailey, 82 Mo. 639; Phefinghauser v. Schearer, 65 Mo. App. 348; Meier v. Meier, 105 Mo. 411; Dalton v. Eaves, 92 Mo. App. 72; Brown v. Brown, 124 Mo. 79; Burnes Est. v. Ayr Lawn Co., 82 Mo. App. 66; Stanclift v. Norton, 11 Kan. 218; Ellwood v. Walcott, 22 Kan. 526; O'Connor v. Shipman, 45 How. Pr. 126; Parker v. Olliver, 106 Ala. 549; Lawler v. French, 104 Va. 140; Brickell v. Batchilder, 62 Cal. 623; Gustav Assn. v. Kratz, 55 Maryland 394; Condon v. Maynard, 71 Md. 601.

H. A. Yonge and *John W. Bernstein* filed argument for defendant in error.

NORTONI, J.—This is a suit in equity for injunctive relief. The finding and judgment were for plaintiff, who is defendant in error here, and defendant in the suit, who is plaintiff in error, prosecutes a writ of error here.

The important question for consideration relates to the right of a trustee to exercise the power of sale vested in him by a deed of trust, on demand of the *cestui que trust*, for a breach of the mortgagor's coven-

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ant to pay taxes accrued on the mortgaged premises. The circuit court denied the right and decreed a perpetual injunction against the exercise of the power of sale for the breach of the covenant mentioned.

By his deed of trust, in the usual form, of date June 1, 1907, and duly recorded, plaintiff in the suit (defendant in error here) conveyed to Charles J. Burde, of the city of St. Louis, Missouri, as trustee, a parcel of real estate, therein described, to secure the payment of a cash loan in the amount of \$2200 and interest thereon, evidenced by certain promissory notes, therein described, payable to Conrad Kraft, Jr. Afterwards defendant in the present suit, and plaintiff in error here, was substituted instead of Burde as trustee in the deed of trust, and thereby clothed with all of the powers conferred in that instrument. The principal note described in the deed of trust in the amount of \$2200 is, by its terms, payable three years after date, and the remaining six notes were for semi-annual installments of interest on the principal sum, in the amount of \$66 each, and payable, respectively, six, twelve, eighteen, twenty-four and thirty-six months after date.

It is stipulated in the deed of trust that "when any one of said notes, whether of interest or principal, became due and payable and should remain unpaid, then all of such notes should become due and payable, whether due on their face or not, to secure the payment of which said notes the party of the first part has executed this deed of trust." The deed of trust stipulates that the plaintiff mortgagor "has also agreed with said third party (the holder of the notes), his indorsees and assigns, to cause all taxes and assessments, general and special, to be paid whenever imposed upon said property, and within the time required by law, and also to keep the improvements upon said premises constantly and satisfactorily insured, until said notes are all paid, against fire, lightning and

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gasoline, in the sum of \$2500, and against windstorms, tornadoes and cyclones, in the sum of \$1500, and the policy or policies therefor to keep constantly assigned unto the said party of the second part, for further securing the payment of said note, and the same apply towards the payment of said notes, unless otherwise paid, when they become due as aforesaid. And the said party of the first part hereby guarantees to the said party of the third part, that the said property herein described is free and clear of mechanics' liens; and said party of the first part further agrees that in case any liens should hereafter be filed against said property, after the execution of this trust, then, and in that case, said liens so filed shall have the same force and effect as if any one of said notes, hereinbefore described, shall have become due and payable, and all the covenants and agreements herein provided shall be in full force and effect; and carried out as if said notes were actually due and payable. And in the event of the said party of the third part, or his assigns or legal representatives, or the party of the second part, or his successors in trust, shall expend any money to protect the title or possession of said premises, or for such insurance as aforesaid, then all such money so expended shall be a new and additional principal sum of money secured by this instrument and shall be payable on demand, and may be collected with interest thereon at the rate of eight per centum per annum, from the time of so expending the same. Now, therefore, if the said party of the first part or his legal representatives or assigns, shall well and truly pay, or cause to be paid, unto the holders thereof, respectively, all and singular the said promissory notes above mentioned at maturity thereof, respectively, according to the tenor of the same, and shall well and truly keep and perform all and singular the several covenants and agreements hereinbefore set forth, then this trust shall cease and be void and the property

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hereinbefore conveyed shall be released at the cost of the said party of the first part; but if either one of said notes or any part thereof, be not so paid at maturity, according to the tenor of the same, *or if default be made in the due fulfillment of said covenants and agreements, or either of them,* then this conveyance shall remain in force, and said party of the second part, or, in case of his death or absence from the city or any other disability, or refusal to act, his successor in this trust may proceed to sell the property hereinbefore conveyed or any part thereof, at public vendue or outcry, etc., etc." (Italics are our own.)

There was no default in the payment of any of the notes described in the mortgage or any part thereof at the time the defendant trustee (plaintiff in error) advertised the property for sale in conformity to the requirements of the deed of trust. However, it appears conclusively, and the court found, that on the twelfth day of January, 1910, and before the advertisement, there were certain general and special taxes assessed against the real estate described in the mortgage that were then due and payable and that such general and special taxes had not been paid when they became due. Because of the default of the plaintiff with respect to the nonpayment of such general and special taxes then past due, defendant trustee, at the request of the legal holder of the notes, proceeded to advertise the premises for sale under the terms of the deed of trust. The proposed sale by the trustee is predicated solely and alone on the default of the mortgagor with respect to the payment of general and special taxes duly assessed against the property and at the time past due. By its decree the court declared "that no valid sale can be made under the powers contained in the said deed of trust on account of a default in the payment of the general and special taxes levied and assessed against said real estate" and therefore perpetually enjoined the sale "on account of a default in

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the payment of the general and special taxes assessed against said real estate."

In support of this judgment, it is argued that, properly construed, the deed of trust confers a power of sale upon the trustee for only such a breach as would cause the debt secured thereby to become due, and that these breaches are defined in the instrument to be, first, default in payment of any one of the notes or a part thereof when due; second, the allowance of a mechanic's lien to be filed against the property; third, the expenditure of any money to protect the title or possession of the premises; or, fourth, for insurance thereon. It is true the deed of trust is more specific with respect to exercising the power of sale for a breach of any one of these covenants than it is as to others; but, be this as it may, it is entirely clear that it contains other distinct covenants and confers the power of sale on the trustee in event they are breached. In plain terms, the plaintiff mortgagor covenanted as follows: "The party of the first part . . . has also agreed with said third party . . . to cause all taxes and assessments, general and special, to be paid." The word "agreed" implies a meeting of the minds or that one binds himself to act or fulfill such agreement. No one can doubt that these words constitute an express promissory covenant on the part of the mortgagor with respect to the payment of taxes, both general and special. No particular form of words is necessary to create an express covenant. Any words importing an agreement are sufficient. [See *Cannock v. Jones*, 3 Exch. 233; *Montford v. Cadogan*, 19 Ves., Jr., 635; *Bower v. Hodges*, 13 C. B. 765.] The subject-matter—that is, that such taxes shall be paid within the time the law requires—is one about which it is competent for the parties to contract and it was eminently proper for them to do so. [See *Rumsey v. People's Ry. Co.*, 154 Mo. 215, 246, 247, 55 S. W. 615.] It is true there is no stipulation in the deed of trust

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here in judgment providing that the entire debt shall become due upon the failure of the mortgagor to keep his covenant with respect to the payment of taxes. But that is unimportant, for the deed in express terms confers a power of sale upon the trustees for a breach of any one of the covenants therein contained, and this includes that pertaining to payment of taxes. The deed provides "if either one of said notes or any part thereof, be not so paid at maturity, according to the tenor of the same, *or if default be made in the due fulfillment of said covenants and agreements, or either of them*, then this conveyance shall remain in force and said party of the second part" may sell the property, etc. etc. Obviously these words conferred power of sale upon the trustee for a breach of any one of the covenants above set forth, including the default as to the payment of taxes.

Such covenants for the payment of taxes and provisions in deeds of trust authorizing a sale of the property for their nonobservance alone are frequently before the courts for review and are upheld. Mr. Jones, in his work on Mortgages (6 Ed.), sec. 1175 says: "It is very generally provided by the terms of the mortgage that the mortgagor shall have the right to sell on the failure of the owner to pay the taxes assessed on the premises, and in such case a default in this particular gives the right to sell as effectually as when the default consists in the nonpayment of the principal sum secured." To the same effect, see Pope v. Durant, 26 Ia. 233; Condon v. Maynard, 71 Md. 601, 605. Another modern and standard authority says: "Moreover, it is competent for such a covenant to provide that a default on the part of the mortgagor to pay the taxes shall constitute a breach of the condition of the mortgage, so as to authorize a foreclosure, although there be no default in the payment of the mortgage debt or interest." [27 Cyc. 1254, 1255.] As touching upon the same question, see

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also Rumsey v. People's Ry. Co., 154 Mo. 215, 55 S.W. 615; Harrington v. Christie, 47 Ia. 319; Hartsuff v. Hall, 58 Neb. 417; Stanclift v. Norton, 11 Kan. 218; Parker v. Olliver, 106 Ala. 549.

It is entirely clear that the deed of trust conferred power upon the trustee to sell the property for the mortgagor's default with respect to the payment of the general and special taxes then due and unpaid, and the court erred in enjoining the sale.

We have examined the other matters put forward in the brief of defendant in error, but regard them without sufficient merit to warrant a discussion in the opinion. The judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

CHARLES WINKLEMAN et al., Respondents, v.
DES MOINES & MISSISSIPPI LEVEE DISTRICT NO. 1, Appellant.

St. Louis Court of Appeals, February 4, 1913.

1. **DRAINAGE DISTRICTS: Liability of New District Succeeding Old: Corporations.** Where a levee district ceased its activities and did not exercise its franchise rights after a judgment was rendered against it, and another levee district, covering the same territory and inhabitants and exercising the same powers with respect to the levying and collecting of taxes, took over, without compensation, all of the property of the old corporation, the latter, in an action on the judgment against the new corporation, will be treated as defunct, although in fact it had not been formally dissolved, and the new corporation will be treated as a continuation of the old; the grant of power and franchises being to the inhabitants of the incorporated territory rather than to the dry shell of the corporation.

2. **CORPORATIONS: Consolidated Corporation: Liability for Debts of Constituent Members.** As a general rule, where two

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or more private corporations are consolidated into a new corporation and the constituent corporations go out of existence, the consolidated corporation may be required to respond for their outstanding liabilities, if no arrangements are made respecting their property and liabilities.

3. **MUNICIPAL CORPORATIONS: Consolidation: Liability for Debts of Constituent Members.** The rule that a consolidated corporation is liable for the outstanding liabilities of its constituent members under certain circumstances applies to a consolidated municipal corporation.
4. **DRAINAGE DISTRICTS: Character: Municipal Corporations.** Drainage districts, incorporated under article 9, chapter 41, Revised Statutes 1909, are public corporations, municipal in character, and resemble in their attributes townships and school districts.
5. **STATUTE OF LIMITATIONS: Reducing Period of Limitation.** Inasmuch as statutes of limitation pertain to the remedy only, it is competent for the Legislature to reduce the period of limitation at any time, provided a reasonable time for the enforcement of existing rights is afforded.
6. **—: Action on Judgment: Statute Applicable.** The Act of 1895, p. 221 (Sec. 1912, R. S. 1909), which reduced the time for bringing action on judgments from twenty years to ten, does not apply to judgments rendered prior to its enactment, and an action on such a judgment is not barred until twenty years after its rendition, although, at the end of that period, more than ten years have elapsed since the time the act became effective.

Appeal from Clark Circuit Court.—*Hon. C. D. Stewart*,
Judge.

AFFIRMED.

C. T. Llewellyn for appellant.

(1) The petition does not state facts sufficient to constitute a cause of action. The existence of Egyptian Levee Co. being pleaded and it being sued, admits its existence, and its existence is presumed to continue, and if still existing, it can have no successor, its liabilities are its own and cannot be saddled upon another and different public corporation. Allegations of status and capacity are material and necessary. *Weil v. Greene County*, 69 Mo. 281; 1 Ency. of Plead. & Prac. p. 796; *State ex rel. v. Bugg*, 224 Mo. 537. (2)

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The appropriation of the property of the Egyptian Levee Company by the Des Moines and Mississippi Levee District would not make the Des Moines and Mississippi Levee District liable for debts of the Egyptian Levee Company. Something more than merely acquiring its property is necessary to make successor liable for burdens of predecessor. *McConey v. Wallace*, 22 Mo. App. 377; *Gamage v. Bushell*, 1 Mo. App. 416; *Scott v. Rebarck*, 67 Mo. 289; *Pier v. Heinrichof-fen*, 52 Mo. 333. (3) Levee and drainage districts are quasi-public corporations and such districts are not liable for tort or negligence of their officers. The appropriation of property or rights of a corporation by officers of another corporation is a tort or wrong for which officers appropriating are individually liable, but not the district of which they are officers. This is a well settled law. *Elmore v. Drainage Commissioners*, 135 Ill. 269; *Sels v. Greens*, 81 Fed. 555; 10 Am. and Eng. Ency. of Law (2 Ed.), p. 235; 5 Thompson on Negligence, sec. 5818; *Arkadelphia v. Windham*, 49 Ark. 139. (4) The ten year Statute of Limitations pleaded by defendant Des Moines and Mississippi Levee District is a compleat bar to plaintiffs' action. R. S. 1899, secs. 4272, 4297; *Seibert v. Copp*, 62 Mo. 182; *Sweet v. Jeffries*, 67 Mo. 420; *Cranor v. School Dis-trict*, 151 Mo. 119; *Tice v. Fleming*, 173 Mo. 49; *Ryans v. Boogher*, 169 Mo. 685.

Berkheimer & Dawson for respondents.

The Des Moines and Mississippi Levee District No. 1 took the assets of said Egyptian Levee Company and is responsible for its indebtedness. *Hughs v. School District*, 72 Mo. 643; *Thompson v. Abbott*, 61 Mo. 176; *Bane's Administrator v. Bank*, 79 Mo. 172; 2 Am. & Eng. Ency. Law p. 1237; *Dillon on Municipal Corporations* (4 Ed.), secs. 171, 172 and 173; *Hill v. City of Kahoka*, 35 Fed. 32; *Broughton v. City of Pen-*

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sacola, 93 U. S. 226; Mobele v. Watson, 116 U. S. 289; Laird against Desota, 22 Fed. 421; People v. Murrey, 75 N. Y. 535; Mt. Pleasant v. Beckwith, 100 U. S. 514; New Orleans v. Clark, 92 U. S. 644; Deveraux v. Brownsville, 70 Am. Rep. 610; Commissioners v. Clark, 70 Pac. 206. (2) The Act of 1895 (Laws of 1895, page 221) did not affect the judgment already obtained as that statute uses the words: "and after the expiration of ten years from the day of the rendition." This section is not retrospective in its application and does not pretend to provide a reasonable period nor fix a period for commencing action on existing judgments. Cranor v. School Dist., 151 Mo. 124.

NORTONI, J.—This is a suit on a judgment. The finding and judgment were for plaintiffs and defendant prosecutes the appeal.

Plaintiffs' predecessor in right recovered the judgment in suit in the circuit court of Clark county on November 19, 1890, in the sum of \$1963.77, against the Egyptian Levee Company, a corporation formed and existing at the time by virtue of an act of the Legislature passed February 27, 1855. The Egyptian Levee Company was incorporated under this act for the purpose of reclaiming and protecting from overflow about 11,000 acres of land in Clark county lying between the Des Moines and Fox rivers and near the Mississippi. [See Session Acts 1855, page 73; Local Laws and Private Acts, 1855, page 281.] During the existence of this corporation, which continued active until shortly before the defendant was organized in 1903, it contracted the indebtedness which was reduced to judgment in November, 1890, as above stated. The judgment was not paid by the Egyptian Levee Company and it appears that corporation ceased its activities before the defendant was organized.

The Egyptian Levee Company was authorized by the act of incorporation to exercise the power of emi-

nent domain and to build and repair levees, ditches and embankments to prevent the inundation of lands within the levee district, to levy taxes to a fixed limit, to pay for the construction of such earthworks, and also collect taxes for the purposes of keeping them in repair. It was authorized, too, to acquire title in fee simple (which it did) to the right of way for its levees and embankments, not to exceed one hundred feet in width. The property thus acquired and constructed by that company consisted of rights of way, levees and ditches, drains, etc., and amounted in value to \$20,000 at the time it was finally taken over or absorbed by defendant.

It appears that several years after plaintiffs' predecessor in right recovered the judgment in suit against the Egyption Levee Company, the board of directors of that company refused to meet and further conduct its affairs or utilize the corporate franchises which it enjoyed. Shortly thereafter, on December 28, 1903, defendant, Des Moines & Mississippi Levee District No. 1, was organized by a decree of the circuit court of Clark county, under the general statutes of Missouri touching such matters—that is to say, under article 7, chapter 122, Revised Statutes of Missouri, 1899. (The same is now Art. 9, chap. 41, R. S. Mo. 1909.) Defendant, Des Moines & Mississippi Levee District No. 1, so incorporated in 1903 under the general statutes, was created for identically the same purpose as the prior corporation, Egyptian Levee Company, against which the judgment in suit was then outstanding and unpaid. Furthermore, the new corporation, or defendant levee district, included precisely the same lands, territory and inhabitants as the old one, and exercised the same powers with respect to levying and collecting taxes for the same purposes.

In the proceedings had with respect to the incorporation of defendant levee district in 1903, the board of supervisors of the new district appointed three dis-

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interested freeholders of the county, under section 8365, Revised Statutes 1899, for the purpose of taking the relinquishment of right of way for levees and drains and to assess the value of any levees or improvements then constructed which might be utilized by the new district. Although these commissioners qualified and acted, they did not assess the value of the right of way, levee and ditches, then constructed and in existence, of the prior Egyptian Levee Company, notwithstanding it is agreed such property was of the value of more than \$20,000. However, defendant Des Moines & Mississippi Levee District No. 1 appropriated the right of way, levees, ditches, drains and improvements of the Egyptian Levee Company to its own use and has continued to use the same ever since.

Though the old Egyptian Levee Company has never been dissolved by an act of the Legislature, or otherwise formally declared out of existance, plaintiffs prosecute this suit against defendant—that is, the succeeding or new corporation—to recover the amount of the indebtedness owing to them by virtue of the judgment against the prior Egyptian Levee Company, on the theory that it is in fact the successor as a continuation of the prior levee company and in which the prior levee company, together with all of its assets, is merged.

It is argued on the part of defendant that the recovery may not be sustained against it for the reason that it does not appear that the prior Egyptian Levee Company had been dissolved and no longer exists. But we are not so persuaded. While it is true that the prior levee company was not dissolved by a formal act of the Legislature, or otherwise, if it were possible to otherwise dissolve it, it appears beyond question that that company ceased active operations after plaintiffs' judgment was recovered and shortly before defendant, or the new levee company, was incorporated.

The record reveals that the board of directors last elected by the old company refused to qualify or to further act in that capacity and utilize the franchises which the company enjoyed by virtue of its incorporation. Immediately thereafter defendant, or the new levee district, was organized under the general statutes for identically the same purposes as the old one. It included and covered the same territory as and no more than the old one did. By virtue of its incorporation, it clothed itself with the same rights of eminent domain and the taxing power possessed and enjoyed by the Egyptian Levee Company, and thereupon took over and appropriated, without any compensation whatever, all of the property, consisting of levees, ditches, drains, etc., owned by the prior company. The inhabitants and the lands included within both corporations were, at the time of the incorporation of the new company, identical and the same. The new company proceeded to exercise the corporate franchises thus acquired for the benefit of the same territory and the same lands and the same inhabitants, to levy taxes, construct levees, drains, etc. etc., and the old company, while remaining in existence, in that it was not formally dissolved, lay dormant with respect to the corporate franchises which it had theretofore enjoyed and which are being utilized as to the same subject-matter by defendant.

In such circumstances, it is competent for the court to treat the old corporation as defunct, though it in fact still exists; for the grant of power and franchises is to the inhabitants of the incorporated territory rather than to the dry shell of the corporation, and these franchises are being utilized each day for the benefit of the same inhabitants as under the old corporation. In other words, because of the voluntary nonuser of the franchises on the part of the old company and their exercise by the new company, the matter amounts in law to a continuation of the old cor-

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poration under the name of the new company, rather than to a new and distinct creation of corporate capacity and liability. [See *Broughton v. Pensacola* 93 U. S. 266; 4 Dillon, Municipal Corporations, secs. 171, 172, 173, also sec. 170.] As a general proposition, when two or more private corporations are consolidated into a new corporation with a new name, and the constituent corporations go out of existence, if no arrangements are made respecting their property and liabilities, the consolidated corporation may be required to respond for the outstanding liabilities of the constituent companies. [See 6 Am. & Eng. Ency. Law (2 Ed.), 818, 819; *Fans' Admr. v. Exchange Bank of Jefferson City*, 79 Mo. 182. See, also, *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 574; *Karn v. Illinois Southern R. Co.*, 114 Mo. App. 162, 89 S. W. 346.] That the principle should obtain alike with respect to the ordinary municipal corporation no one can doubt. Indeed, the doctrine has been affirmed and enforced by our Supreme Court in the case of such municipal corporations as school districts, where the debtor district had been absorbed through the incorporation of a new school district under the statute, and included the same and additional territory as that constituting the former incorporated body. [See *Thompson v. Abbott et al.*, 61 Mo. 176; *Hughes v. School District*, 72 Mo. 643.] The principle is eminently just and should be extended to every case where the new corporation comes into existence and includes the same territory and the same inhabitants for the same purposes as the old one and appropriates the property of the prior corporation to the uses of the inhabitants for which the corporation was erected to serve. [See 4 Dillon Municipal Corporations, secs. 170, 171, 172, 173; *Hill v. City of Kahoka*, 35 Fed. 32; *Broughton v. Pensacola*, 93 U. S. 266; *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Court Rep. 398; *People v. Murray*, 73 N. Y. 535.] That drainage districts incor-

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porated under the statutes such as those involved here are public corporations of the State, municipal in character, and resembling in their attributes townships and school districts, is settled by the Supreme Court decisions to that effect. [See *Wilson v. Drainage & Levee Dist.*, 237 Mo. 39, 139 S. W. 136; *Morrison v. Morey*, 146 Mo. 543, 560, 561, 48 S. W. 629.] The court very properly found the issue for plaintiffs and gave judgment enforcing the liability of defendant for the obligation of the Egyptian Levee Company on the theory that it was merely a continuation of the old company under a new name.

But defendant insists that a recovery on the judgment in suit is barred by the Statute of Limitations. The judgment was recovered on November 19, 1890, in the sum of \$1963.77 against the Egyptian Levee Company and together with accrued interest and costs now amounts to nearly \$5000. At the time this judgment was recovered, the statute prescribed a limitation period of twenty years as to such judgments, but in 1895, or about five years after the recovery of the judgment, the limitation statute was amended and the period of limitation theretofore prescribed at twenty years was fixed by the amendment at ten years instead. [See Laws 1895, p. 221; and, as amended, see Sec. 1912, R. S. 1909.] The amended statute contains no words suggesting that it should be retroactive in its operation. Furthermore, it makes no provision as to a reasonable time for suits on judgments recovered prior to its enactment. This suit was instituted against defendant on the judgment December 7, 1905, or fifteen years after the judgment was recovered, and more than ten years after the Statute of Limitations was amended reducing the period of limitations from twenty years to ten. It is argued by defendant that though it be conceded the statute is not retroactive in its operation, a recovery on the judgment is nevertheless barred by the amended statute for the reason

that ten full years elapsed after the amendment and prior to the institution of this suit. When we consider that Statutes of Limitation pertain to the remedy only, and that it is competent for the Legislature to reduce the period of limitation at any time so long as a reasonable time for enforcement of existing rights is afforded, it would seem that the argument inheres with much force; but, be this as it may, the proposition is concluded here by prior decisions of the Supreme Court on the identical statute and amendment thereto now in judgment. In those cases, the court says the amended statute must be regarded as having no application to judgments rendered prior to its enactment. [See *Tice v. Fleming*, 173 Mo. 49, 55, 56, 72 S. W. 689; *Cranor v. School Dist.*, 151 Mo. 119, 52 S. W. 232.] The syllabi in the case of *Tice v. Fleming*, *supra*, seems to support defendant's argument here, but upon a scrutiny of that case, it is not sustained by the opinion of the court, which it purports to reflect. However, on a prior occasion this court was misled by the language of that syllabi and stated the rule of law in *Bick v. Robbins*, 131 Mo. App. 670, 111 S. W. 612, to the effect that the amended statute of 1905 prescribed a limitation of ten years from the date of its passage, available against actions on judgments then in existence, when the judgment would not be barred at an earlier date under the statute before its amendment. What was there said on this question should be expressly overruled, for it is obvious that the Supreme Court holds that the amendment of 1905 is not applicable *at all* to judgments recovered prior to its enactment.

The judgment should be affirmed. It is so ordered. *Reynolds P. J.*, and *Allen, J.*, concur.

HENRY BRUEGGEMANN, Respondent, v. CARON-
DELET ICE MANUFACTURING & FUEL
COMPANY, Appellant.

St. Louis Court of Appeals, February 4, 1913.

MASTER AND SERVANT: Injury to Servant: Falling Into Unguarded Pit: Proximate Cause. An employee, while endeavoring to start a steam pump by means of a lever, lost his balance and fell into an unguarded pit adjacent to the pump, as a result of a sudden jerk of the lever, sustaining injuries he would not have received if the pit had been reasonably guarded so as to prevent persons from falling into it. *Held*, that the failure to guard the pit, and not the sudden jerk of the lever, was the proximate cause of his injuries.

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey*, Judge.

AFFIRMED.

Watts, Gentry & Lee for appellant.

The condition of the premises—that is, the unguarded condition of the pit—was not the proximate cause of plaintiff's injury and he was therefore not entitled to recover. The proximate cause was the jerking of the pump, which was a mere accident. *Jackson v. Elevator Co.*, 209 Mo. 506; *Huston v. Railroad*, 129 Mo. App. 586; *Goransson v. Manufacturing Co.*, 186 Mo. 300; *Foley v. McMahon*, 114 Mo. App. 442; *Jones v. Cooperage Co.*, 134 Mo. App. 324; *Fulwider v. Gas L. & P. Co.*, 216 Mo. 582; *Thornberry v. Milling Co.*, 126 Mo. App. 660; *Coal & Coke Co. v. Phaup*, 121 S. W. 651; *P. H. & F. M. Roots Co. v. Meeker*, 165 Ind. 132; *Elliott v. Alleghany County L. Co.*, 204 Pa. St. 568; *Willis v. Armstrong*, 183 Pa. St. 184; *Oil Co. v. Crawford*, 122 S. W. 916; *Railroad v. Dinius*, 170 Ind. 222; *Railroad v. Wiley*, 118 S. W. 1127.

Brueggemann v. Ice Co.

Charles P. Comer and England & England for respondent.

It cannot be said that the injury to plaintiff was caused by an accident. Plaintiff's injury was a natural and probable consequence of defendant's negligence in failing to safeguard the open pit at the place where plaintiff was required to work. The jerking of the pump was not the sole cause of plaintiff's injury. The injury was caused by the combined result of the jerking of the pump and the negligence of the defendant in maintaining the open and unguarded pit at the place where plaintiff was required to work. Under such facts, plaintiff is entitled to recover, if he was in the exercise of due care at the time of his injury. Bassett v. City of St. Joseph, 53 Mo. 300; Newcomb v. Railroad, 169 Mo. 409; Carterville v. Cook, 129 Ill. 152; Kube v. Transit Co., 103 Mo. App. 591; Musick v. Packing Co., 58 Mo. App. 334; Leine v. Contracting Co., 134 Mo. App. 561; Lore v. Manufacturing Co., 160 Mo. 626; Woodson v. Street Railway, 224 Mo. 707.

REYNOLDS, P. J.—This is an action for damages sustained by plaintiff from falling into a pit in the plant of defendant, appellant. It is alleged that there was an open pit in the room in which plaintiff was at work, that this pit was not surrounded by railings or other safeguards for the protection of employees, whose duty it was to work near it, the specific negligence and carelessness charged being failure to inclose the pit or otherwise safeguard it, and so failing to provide plaintiff, an employee of defendant, with a reasonably safe place in which to work. Damages are claimed in the sum of \$7500 for injuries sustained, which consisted of fracture of plaintiff's left arm just below the shoulder.

The answer is a general denial with a plea of contributory negligence, the contributory negligence

charged being that plaintiff had gone into the room, alongside of which was this pit, without carrying with him a light, and without turning on the lights with which the place was equipped, which latter plea was put in issue by the reply.

The trial was before the court and to a jury. A verdict of \$1200 having been returned in favor of plaintiff, judgment following, defendant, filing its motion for a new trial and saving exception to that being overruled, duly perfected appeal to this court.

Plaintiff's account of the accident, and he was the only witness to it, was that while in the employ of defendant as a night watchman and acting under the direction of the engineer in charge of the plant, which was an ice manufacturing plant, he went through the tank room of the plant, intending to go to the ice room and get out some manufactured ice. In one corner of this tank room was a pump operated by steam. When steam was turned on, as was the case at the time of this accident, it was the duty of plaintiff to see that the pump operated. All that he had to do to put it in operation was to pull a little lever attached to it, if the pump was out of order or had stopped, whereupon the pump would start up and keep running as long as the pressure of steam was on. Alongside of this tank room in which the pump was located was an open pit five feet deep and four or five feet wide, unprovided with any railing or guard of any kind. The pump was set on the floor of the tank room about eight inches from the pit.

On the night of the accident plaintiff, according to his testimony, was in the ice room, which is on the other side of this pit from the tank room, dealing out ice to customers. While he was in this ice room and not hearing the pump "knocking," he concluded it had stopped. Going out to examine it and walking along the floor of the tank room and along the side of the pit, he saw that the pump had stopped. He took

hold of the lever attached to the pump, by which it is started, and jerked it. There was a full pressure of steam on, and while this lever generally comes back after being pulled, on this occasion, as plaintiff testifies, in pulling it to start the pump he overbalanced himself and fell into the pit, being then about three inches from the edge of the pit. There were no electric lights in the place that night but plaintiff testified that he was carrying a lighted lantern with him at the time. The plant is in operation day and night, although it had not been running that day or night but was just about ready to start up again. Plaintiff testified that he fell down into this pit, right by the pump. He further testified that a railing or banister placed along this pit would not have interfered with it for the purposes for which it was intended but that there was no kind of partition there, nothing but the open pit.

Plaintiff testified as to his injuries, which consisted, as before stated, of a broken arm; that he was fifty-six years old; that he was earning two dollars a day at the time of his injury and had been employed by defendant off and on for six years; that since his injury he had not been able to do any work at all except for two days; had worked a little but had to quit as he could not stand it. This is practically all of his testimony.

Defendant, at the close of plaintiff's evidence and again at the close of all the testimony, interposed demurrers which were refused, defendant excepting.

At the request of plaintiff the court instructed the jury, among other things, that if they found that the pump in question was located within a short distance of the pit and that the proximity of the pit to the pump exposed anyone engaged in starting or stopping the pump to the danger of falling into the pit unless it was guarded by a rail or some other device that would obviate the danger of falling into it, and if the jury believed from the evidence that defendant knew or by

the exercise of ordinary care might have known that the operation of the pump by any of its employees exposed them to the danger of falling into the pit, if not guarded in some reasonable way, and the defendant negligently failed to thus guard the pit, and if they further found that plaintiff, while engaged in the performance of his duty and in seeing that the pump was kept in operation, was required to go to the pump to start it and that while starting it and still exercising ordinary care under the circumstances for his own safety, he nevertheless fell into the pit in consequence of its proximity to the pump and the absence of any railing or guard to prevent his falling into it, and that as a direct result of falling into the unguarded pit while engaged in the performance of his duty at the place stated, he was injured, they should return a verdict for plaintiff.

The court further told the jury that while an employee, in accepting employment, assumes the ordinary risks incident to it, he does not assume those occasioned by the negligence of the employer, and while plaintiff in the present case assumed the ordinary risks incident to the work he was called upon to perform, he did not assume those, if any, arising from the negligence of defendant.

The court further instructed as to the measure of damages and what constituted ordinary care.

No error is assigned here to the giving of these instructions, save that it is claimed by the appellant that the case should not have gone to the jury at all and that its demurrer to the evidence should have been sustained; on this the sole assignment of error is founded. In support of this it is claimed that the evidence taken as a whole entirely fails to establish any negligence whatever on the part of the employer, plaintiff with full knowledge of the conditions having assumed the risk. It is further argued that the unguarded condition of the pit was not the proximate

cause of plaintiff's injury and he was therefore not entitled to recover; that the proximate cause was the jerking of the pump which was a mere accident.

We are unable to accede to these arguments. In an old case, Bassett v. City of St. Joseph, 53 Mo. 290, l. c. 300, it appeared that the plaintiff, walking along a street of the city, had occasion to pass near a mule standing by an excavation in the street. The mule became frightened and either kicked plaintiff or plaintiff started back in consequence of the action of the mule and fell into this excavation. The court, at page 300, referring to this, said that if the excavation was there, extending into the public thoroughfare, making it in a dangerous condition, and plaintiff, carefully traveling along the highway, was frightened by the mule, and when attempting to avoid it, was precipitated or jumped into the excavation and was injured, it could not be said that in the nature of things, the kicking of the mule or the fright caused thereby could have been considered the sole cause of the injury. "It is true," said the court, "that if it had not been for the attempt of the mule to kick, the injury might not have occurred; and it is equally true, that if there had been no excavation at hand, the kicking of the mule would have been harmless. How can it be said in such case that either the one or the other of these circumstances was the sole cause of the injury; necessarily each cause contributed, but it took both causes combined to produce the injury." It is further there said that if, on the one hand, the primary cause of the injury was the kicking of the mule or the attempt of plaintiff to escape injury from the mule, no recovery could be had against the city; on the other hand, if the plaintiff, while using ordinary diligence and care on her part, and guilty of no fault, was injured by falling into the excavation, she would have a right to recover, notwithstanding the cause contributing to the injury was the attempt of the mule to kick her and she, in attempting

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to protect herself from injury about to be inflicted by the mule, did jump into the excavation and was thereby injured. The case has always been recognized as stating the rule prevailing in our State and has been cited as authority in many cases. *Lore v. American Mfg. Co.*, 160 Mo. 608, 61 S. W. 678, refers to, applies and adopts it.

In *Warner v. St. Louis & Meramec River R. R. Co.*, 178 Mo. 125, 75 S. W. 67, Judge MARSHALL, speaking for Division One of our Supreme Court, says (l. c. 134), that the mere concurrence of negligence and injury does not make the defendant liable. There must be a direct connection between the negligent act and the injury and the negligence must be the proximate cause of the injury. If the injury may have resulted from one of two causes, for one of which and not the other the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture the plaintiff must fail in his action. Many authorities are cited in support of both these propositions.

Applying the rule in the Bassett case to the facts before the court in *Graefe v. St. Louis Transit Co.*, 224 Mo. 232, l. c. 272, 123 S. W. 835, Judge Fox, referring to that case, says that it may be true that if it had not been for the shying of the mules, which was caused by the sudden blowing off of steam, the injury might not have occurred, but that it is equally true that if there had been no defect in the street and if the street had been in a reasonably safe condition, the shying of the mule would have been harmless and no injury would have occurred.

The last reference to the Bassett case which we have found is in *Obermeyer v. Logeman Chair Co.*, 229 Mo. 97, 129 S. W. 209. There Judge Woodson, at page 110, summarizes it as holding that the kicking

of the mule or the fright caused thereby was not the sole cause of the injury and that plaintiff was entitled to recover if she was in the exercise of ordinary care. Stating that the instruction referred to in the Obermeyer case was in line with this and other authorities cited, the court refers to the Bassett case as properly stating the law.

Applying the law as announced in these cases to the facts in the case at bar, it may be said with absolute certainty that the sudden jerk which threw respondent off of his balance could not possibly have resulted in any injury to him, so far as the evidence here shows, unless as the result of that he had fallen into the pit. If the pit had been reasonably protected and reasonably guarded to have prevented those having occasion to work in its vicinity from falling into it, it is clear that plaintiff would not have been hurt.

It is to be noted that there is no charge here made that plaintiff had handled the lever, the jerk of which threw him backward, negligently. The contributory negligence charged is going into the room without his lantern being lighted. His evidence is positive that he had his lighted lantern with him; that but for the light of his lantern, the place was dark, the engineer having removed the electric lamps from the tank room. There is no serious contradiction of this.

The jury were properly instructed in this case and, as remarked, no complaint whatever is made of the instructions, provided any instruction should have been given. We hold that this was peculiarly a case for the jury, and we see no occasion to disturb its verdict.

The judgment of the circuit court is affirmed.
Norton and Allen, JJ., concur.

State v. Smith.

STATE ex rel. MOUNT, Curator, etc., Respondent, v.
JAMES H. F. SMITH et al., Appellants.

St. Louis Court of Appeals. Argued and Submitted January
7, 1913. Opinion Filed February 4, 1913.

1. **APPELLATE PRACTICE:** Former Decision: Law of Case. The decision rendered in a case by an appellate court is the law of the case on a subsequent appeal.
2. _____: Effect of Assuming Position in Litigation: Estoppel. Where, throughout long-pending litigation, a party sought to sustain himself as curator, a subsequent claim by him, in an action on his bond, that he was only chargeable, if at all, as an administrator, came too late.
3. **GUARDIAN AND WARD: Action on Curator's Bond: Form of Judgment.** A judgment, in an action on a curator's bond, that the bond be declared forfeited and that judgment be rendered against the principal and the sureties, naming them, in the amount of the penalty of the bond, and that a special execution issue in favor of plaintiff and against defendant for the amount of damages awarded by the verdict and for costs, substantially complies with the statute.

Appeal from Scotland Circuit Court.—*Hon. Chas. D. Stewart, Judge.*

AFFIRMED.

O. D. Jones and E. R. Bartlette for appellant.

Smoot & Smoot for respondents.

REYNOLDS, P. J.—The contention out of which this case grows has been before the Supreme Court a number of times, one branch of it before us. This is the second appeal of this case to our court. On the former appeal we reversed and remanded it for error of the trial court in not confining the testimony as to the costs and expenses incurred and for which the curator and his sureties were said to be liable

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on bond as curator, to such expenses as were incurred in holding the curator liable as such only as related to his resistance to the claim of the minor to an interest in certain real estate; that is, in not excluding the testimony as to costs and expenses incurred in so much of the action as related to the partition of the real estate, we holding him liable to account to his ward only for money put into the real estate which had come into the curator's hand as of the money of his ward. We also reversed the judgment and remanded the cause because of the absence of evidence showing the reasonable value of services rendered.

We have examined the abstract of the record in this case and considered it in connection with the brief and argument of the learned counsel for appellants and have concluded that there is no reversible error now presented. For the main facts in the case it is sufficient to refer to the statement made by Judge GOODE when the case was here on the former appeal, as reported State ex rel. Mount v. Smith, 139 Mo. App. 101, 120 S. W. 614.

At the present trial the evidence was confined to the services and their value so far as concerned the effort to establish the claim of the minor to the land in which his own money had been invested by the curator.

In instructions given at the instance of plaintiff the jury were specifically confined to the issues as laid down by this court when the case was formerly here.

At the instance of appellants, defendants below, the court specifically instructed the jury that plaintiff was not entitled to any damages for any attorney's services or expenses paid by him in litigating his right to the money which went into the purchase of the land and was derived from his mother.

Our former decision (139 Mo. App. 101, 120 S. W. 614) is the law of the case. [Metropolitan Bank

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of St. Louis v. Taylor, 62 Mo. 338; Bagnell Timber Co. v. Missouri, Kansas & Texas Ry. Co., 242 Mo. 11, l. c. 21, 145 S. W. 469.] That disposes of all the most substantial contentions made by learned counsel for the appellants in the trial court and now submitted to us.

The point in the case now presented, that the circuit court of Schuyler county had no jurisdiction of the proceedings in which the appellant Smith was removed as curator and John C. Mills appointed in his place, now sought to be brought into this case, was disposed of by our court in *In re Estate of Padgett*, 114 Mo. App. 307, 89 S. W. 886. This appellant, the curator, was a party to that. Other points in the case have been disposed of adversely to the contention of appellant in one or more of the several appeals and writs of error which one of the present appellants, James H. F. Smith, prosecuted in the Supreme Court. [See *Padgett v. Smith*, 206 Mo. 303, 103 S. W. 943.] The last occasion that the matters in great part here involved were before our Supreme Court is *Padgett v. Smith*, 207 Mo. 235, 105 S. W. 742. Counsel for appellants seem to misunderstand this last decision. What is there held is that the services of the attorney for the minor for that part of the litigation pertaining to partition suit must be settled and determined by the circuit court in which the decree of partition was entered, that is to say, the circuit court of Schuyler county. That opinion does not hold that resort must be had to the Schuyler circuit court to tax and allow for the services of attorneys rendered outside of the partition branch of the case.

The appellant Smith, after having sought to sustain himself throughout all this long litigation as curator, now claims that he was chargeable, if at all, as administrator of the estate of his wife. That suggestion comes too late.

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Counsel complain of the form of the verdict and judgment. We see no error in either. The verdict is that the jury find for plaintiff in the sum of \$190. The judgment is that the bond be declared forfeited and judgment be and is rendered against James H. F. Smith and his sureties on the bond, naming them, in the sum of \$5000, and that a special execution issue in favor of plaintiff and against defendants for the sum of \$190, and the costs of the suit, which the court finds and adjudges that plaintiff is entitled to recover. We see no error in this. It is in substantial compliance with the statute.

The judgment of the circuit court is affirmed. *Norton and Allen, JJ.*, concur.

CONNECTICUT FIRE INSURANCE COMPANY,
Respondent, v. CHESTER, PERRYVILLE &
STE. GENEVIEVE RAILROAD COMPANY.
Appellant.

St. Louis Court of Appeals. Argued and Submitted January 6, 1913. Opinion Filed February 4, 1913.

1. **RAILROADS: Fires: Sufficiency of Evidence.** In an action against a railroad company for damages from a fire alleged to have been set by one of its engines, circumstantial evidence held to warrant a finding that the fire was started by a spark from defendant's engine.
2. **EVIDENCE: Opinion Evidence: Distance Sparks Will Carry.** A witness, who had had experience with firing threshing engines, and had observed the operation of locomotives with respect to throwing off sparks when fired with wood, as compared with threshing engines, and how far such sparks carried, was competent to testify as to how far sparks from a locomotive burning wood could be carried, as compared with those thrown off by a threshing engine burning wood, although he had never operated a locomotive.

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3. **INSTRUCTIONS: Refusal: Commentary on Evidence.** An instruction which comments on particular facts is properly refused.
4. **WITNESSES: Competency of Wife; Agent of Husband.** A wife is not a competent witness for her husband, in an action by him for damages to his dwelling from a fire alleged to have been set out by defendant, on the theory that, having been left in charge of the premises by him, she was his "agent," within Sec. 6359, R. S. 1909.
5. **_____: _____. Husband Party in Interest.** Sec. 6359, R. S. 1909, which provides that a wife may, in certain instances, testify in an action in the name of or against her husband, is an enabling statute, grafting exceptions upon the common law, and unless she comes within them, she is not competent to testify when her husband is a party in interest, whether a party to the action or not.
6. **APPELLATE PRACTICE: Admitting Evidence on Wrong Theory: Harmless Error.** In an action on an assigned claim, where it is not shown that the assignor has any pecuniary interest in it, his wife is a competent witness for the assignee, and the fact that the court permits her to testify on the erroneous theory that she was her husband's agent, within Sec. 6359, R. S. 1909, when in fact she was not such agent, is immaterial.
7. **WITNESSES: Establishing Agency of Spouse: Competency of Husband or Wife.** A husband or wife is a competent witness to prove the agency of the other.
8. **EVIDENCE: Opinion or Fact: Distance Sparks Will Carry.** In an action for damages from a fire alleged to have been caused by sparks from defendant's engine, testimony as to whether sparks from a fire in the yard could have ignited the roof was not opinion evidence but was testimony of a fact, and was properly admitted.
9. **INSURANCE: Assigned Claim: Action by Insurance Company: Measure of Damages.** Where an insurance company paid insurance on a house alleged to have been burned through the negligence of a railroad company, and the insured assigned his cause of action to it, the measure of recovery, in an action by it against the railroad company, was the full amount of the damage sustained, irrespective of what might have been recovered under the policy; the action being on the assignment and not on a right obtained through subrogation.
10. **TRIAL PRACTICE: Appellate Practice: Argument of Counsel: Invited Error.** In an action by an insurance company on an assigned claim for damages from fire alleged to have been set out by defendant, where the attorney for defendant stated

to the jury that plaintiff should not be allowed to recover more than the amount of insurance it had paid its assignor, defendant will not be heard to complain of a statement by plaintiff's attorney in reply that, though plaintiff had only paid a certain amount, it had to come into court and suffer delay and expense, especially in view of the fact that the damages allowed were not excessive.

Appeal from Ste. Genevieve Circuit Court.—*Hon. Peter H. Huck, Judge.*

AFFIRMED.

Giboney Houck and Davis & Hardesty for appellant.

(1) The demurrers to the evidence should have been sustained. (a) Defendant's evidence tending to show the true source of the fire to be other than an engine requires that plaintiff's circumstantial evidence be of the strongest character. *Brooks v. Railroad*, 98 Mo. 106; *Torpey v. Railroad*, 64 Mo. 382; *Peck v. Railroad*, 31 Mo. App. 123; *Peffer v. Railroad*, 98 Mo. App. 292; *Gibbs v. Railroad*, 104 Mo. App. 276; *Bank v. Railroad*, 98 Mo. App. 336; *Hallon v. Fuel and Light Co.*, 105 S. W. 428; *Wright v. Railroad*, 107 Mo. App. 212; *Big. Riv. Ld. Co. v. Railroad*, 101 S. W. 638; 123 Mo. App. 394; *Manning v. Railroad*, 137 Mo. App. 631. (b) But from plaintiff's circumstantial evidence there can be deduced no rational inference that an engine caused the fire. *Torpey v. Railroad*, 64 Mo. App. 387; *Morrow v. Pullman Co.*, 98 Mo. App. 357; *Callehan v. Warner*, 40 Mo. 132; *Gibbs v. Railroad*, 104 Mo. App. 276; *Manning v. Railroad*, 137 Mo. App. 631; *Mockowik v. Railroad*, 196 Mo. 571; *Bank v. Railroad*, 98 Mo. App. 335. (c) The remoteness of time when an engine passed is, alone, sufficient to preclude recovery. *Foster v. Railroad*, 143 Mo. App. 547; *Gibbs v. Railroad*, 104 Mo. App. 283; *Bank v. Railroad*, 98 Mo. App. 335; *Manning v. Railroad*,

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137 Mo. App. 631; Schaub v. Railroad, 133 Mo. App. 444; Linkauf v. Lombard, 137 N. Y. 417; Hémmens v. Nelson, 20 L. R. A. 445. (2) In admitting evidence and refusing instructions thereon, the court committed reversible error. (a) Evidence of thresher engine sparks should have been excluded, and defendant's instructions 7 and 8, directed to the elimination of the improper testimony received, should have been given. Campbell v. Railroad, 121 Mo. 349; Sheldon v. Railroad, 14 N. Y. 223; Railroad v. Richardson, 91 U. S. 454; Railroad v. Gilbert, 52 Fed. 711; Mills v. Railroad, 76 S. W. 30; Railroad v. Barrow, 20 S. W. 165; Railroad v. Richardson, 99 S. W. 642; Railroad v. Short, 77 S. W. 936; 16 Cyc. 1114; 33 Cyc. 1372-1376; Campbell v. Railroad, 121 Mo. 349; Cotton Co. v. Railroad, 114 Fed. 133. (b) Maddock's wife was incompetent to testify in behalf of his assignee. Johnson v. Burks, 103 Mo. App. 230; Wheeler, etc. Co. v. Tinsley, 75 Mo. 458; White v. Chaney, 20 Mo. App. 389; Gardner v. Railroad, 124 Mo. App. 461; City of Joplin ex rel. v. Freeman, 125 Mo. App. 717; Bank v. Wright, 104 Mo. App. 242; Fishback v. Harrison, 137 Mo. App. 634. (c) Anna Knoll's opinion as to whether sparks from the kettle-fire in the yard could have ignited the roof should also have been excluded. Gavish v. Railroad, 49 Mo. 274; Kent v. Miltenberger, 15 Mo. App. 480; Railroad v. Stock Yards Co., 120 Mo. 541; Koenig v. Railroad, 176 Mo. 698. (3) Plaintiff's instructions 1, 2 and 3 should have been refused, because they authorized a recovery exceeding \$558.85, the limit of plaintiff's liability to Maddock. Sec. 3151, R. S. 1909; Walker Bros. v. Railroad, 68 Mo. App. 471; Foster v. Railroad, 143 Mo. App. 547; Ins. Co. v. Railroad, 74 Mo. App. 106; Brown v. Fire Ins. Co., 83 Vt. 161; Dyer v. Railroad, 99 Me. 195; Railroad v. Roper, 36 L. R. A. (N. S.) 954; Ins. Co. v. Railroad, 20 L. R. A. 410; Life Ins. Co. v. Richards, 99 Mo. App. 93; Whitemore v. Supreme Lodge, 100 Mo. 36; Life Ins.

Co. v. Rosenheim, 56 Mo. App. 27; Huesner v. Life Ins. Co., 47 Mo. App. 336; Morrison Adm'r v. Marine & Fire Ins. Co., 18 Mo. 262; 19 Cyc. 638; Sun Ins. Office v. Merz, 63 N. J. L. 365. (4) The injury, from opposite counsel's argument for including in the verdict expenses of delay and litigation, should have been prevented by the court. Selby v. Railroad, 122 Mich. 311; Railroad v. Nesbit, 40 Tex. Civ. App. 309; Haynes v. Town of Trenton, 108 Mo. 133.

Noell & Noell for respondent.

(1) Appellant's counsel complain of plaintiff's instructions numbered 1, 2 and 3 because they authorized a recovery exceeding \$558.85, the amount of the insurance paid by plaintiff to George Maddock. Appellant's counsel seem to overlook the fact that the assignment from Maddock to plaintiff conveys to plaintiff Maddock's entire cause of action for the damage done him by the fire. Without an assignment from Maddock the plaintiff insurance company would have been subrogated to Maddock's right to recover damages from defendant to the extent of \$558.85, the amount of the insurance paid Maddock by plaintiff. Ins. Co. v. Railroad, 149 Mo. 165; Ins. Co. v. Railroad, 74 Mo. App. 106. But the assignment carried to plaintiff Maddock's entire cause of action against defendant, which was the entire damage sustained by Maddock by reason of the fire. Snyder v. Railroad, 86 Mo. 613; Smith v. Kennett, 18 Mo. 154; Dickson v. Elevator Co., 44 Mo. App. 498; Childs v. Railroad, 117 Mo. 414; Chouteau v. Boughton, 100 Mo. 407. So far as the excess of damages sustained by Maddock over and above the amount of insurance paid him is concerned, plaintiff is a trustee of an express trust and entitled to sue therefor in its own name under and by virtue of the assignment. And a claim can be assigned without consideration for collection only, and the assignment carries a valid title to the assignee which the de-

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fendant cannot dispute. R. S. 1909, sec. 1730. Bank v. Edwards, 84 Mo. App. 462; Beattie v. Lett, 28 Mo. 596; Reyburn v. Mitchell, 106 Mo. 366; Haysler v. Dawson, 28 Mo. App. 531. (2) The wife of George Maddock, having been left as his agent in charge of his house, was a competent witness in the case. R. S. 1909, sec. 6359; Basye v. Railroad, 65 Mo. App. 468; Reed v. Peck, 163 Mo. 333. And the agency of the wife can be proved by her own testimony. Reed v. Peck, 163 Mo. 338; Leete v. Bank, 115 Mo. 184; Long v. Martin, 152 Mo. 668. (3) Defendant's refused instructions 7 and 8 were, as hereinbefore stated, comments on the evidence, and for that reason were properly refused. These instructions both singled out certain evidence and commented on the force and effect thereof. Imboden v. Trust Co., 111 Mo. App. 220; Shanahan v. Transit Co., 109 Mo. App. 228; Smith v. Woodmen of World, 179 Mo. 137; Swink v. Anthony, 96 Mo. App. 420; Ewing v. Ewing, 44 Mo. 20; Carroll v. Paul's Adm'r, 16 Mo. 226; Fine v. St. Louis Schools, 30 Mo. 175. (4) It is plain from the testimony in this case that George Maddock's property was set on fire by a spark from one of defendant's engines. Hence the verdict of the jury and judgment of the court were for the right party. There was no error committed by the trial court against the defendant materially affecting the merits of the action. It is therefore respectfully submitted by counsel for respondent that there is no ground for reversing this case. R. S. 1909, sec. 2082; Cross v. Gould, 131 Mo. App. 585; Freeland v. Williamson, 220 Mo. 217; Stump v. Kopp, 201 Mo. 412; Mann v. Doerr, 222 Mo. 1; Berry v. Railroad, 214 Mo. 593; Armelio v. Whitman, 127 Mo. App. 698; Logan v. Field, 192 Mo. 54; O'Keefe v. Railroad, 124 Mo. App. 613; Chaplin v. Transit Co., 114 Mo. App. 256.

REYNOLDS, P. J.—This is an action for damages alleged to have been sustained by one George

Maddock, in consequence of the destruction by fire of a dwelling and outbuilding owned by Maddock, the fire, it is alleged, having been communicated to the buildings from sparks thrown out by an engine of the defendant. Maddock, the owner, carried insurance on the property. After the fire he was paid \$558.85 by the insurance company on the loss. Whereupon he assigned his claim for damages against the railroad company for the loss to the insurance company, plaintiff below, respondent here. It is by virtue of this assignment that plaintiff instituted this action, in which it was awarded a verdict in the sum of \$636.85. Judgment following, defendant, filing a motion for new trial and saving exception to that being overruled, has duly perfected appeal to this court.

Here counsel for appellant assign four grounds on which reversal is asked.

The first error assigned is to the refusal of the court to sustain the demurrers interposed by defendant to the testimony in the case. In support of this assignment it is claimed that defendant having introduced evidence tending to show the true source of the fire to have been other than the sparks from the engine, it devolved upon plaintiff to produce circumstantial evidence of the strongest character; it had failed in this and from the circumstantial evidence produced in the case, no rational inference could be drawn that the fire had been caused by sparks from the engine, the remoteness of time when an engine passed the premises being alone sufficient to preclude recovery. We dispose of this assignment by saying that the evidence connected with the fire, the movements of the engine, the escape of sparks, in short, all matters connected with the origin of the fire were fully gone into and there was substantial evidence to warrant the jury in arriving at its verdict, so far as relates to the origin of the fire; that is, that it originated from sparks from a passing engine, operated by the defendant's em-

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ployees. While there was no direct testimony as to this, the circumstantial evidence was sufficient to warrant the jury in arriving at the conclusion which it did as to the origin of the fire.

The second error assigned is to the admission of evidence and refusal of instructions thereon. The principal evidence objected to was that of a witness who testified as to the distance sparks thrown off by the engine of the defendant could be carried as compared with those thrown off by an engine of a threshing machine. It is claimed that this witness knew nothing of the operation of a locomotive engine and that therefore he was not in a position to make comparison between it and the engine of a thresher. That witness testified that he had observed the workings of a threshing machine engine as compared with a locomotive engine as to throwing out sparks, when burning wood, and that he thought they were similar. It is true that he did not claim to have ever operated a locomotive engine, while he had had much experience with the ordinary engines used in connection with threshers, but he also testified that he had frequently observed the operation of locomotive engines with respect to throwing off sparks when fired with wood, and how far such sparks were carried. We think this was sufficient to entitle him to testify, by comparison, as he did, when each had been fired with wood, as there was evidence tending to show was the case with this engine.

The refused instructions referred to are numbered 7 and 8. They are so glaringly comments on particular facts that there was no error in refusing them.

Under this second assignment it is further urged that the wife of the assignee Maddock, who was permitted to testify as to the facts connected with the fire and as to the value of the household goods destroyed, was incompetent to testify in behalf of the

assignee of her husband. She was permitted to testify on the ground that she was the agent of her husband. She and her husband testified that the husband was away from home, a mile or two distant, engaged in work of some kind, and had left the wife in charge of the house and premises, and that in his absence she was his agent. We do not think that she should have been permitted to testify as agent of her husband, as we do not think that she came within the exceptions of section 6359, Revised Statutes 1909. This present action was not one upon a policy of insurance, nor against a carrier, hence the wife did not fall within such cases. The only ground upon which she could be admitted as a witness, if her husband had been a party, is the third clause of section 6359, Revised Statutes 1909. That removes her disqualification as a witness in any civil suit or proceeding prosecuted in the name of or against her husband, whether joined or not with her husband as a party, "in all matters of business transactions when the transaction was had and conducted by such married woman as the agent of her husband." It was held by our court in *Gardner v. St. Louis, I. M. & S. R. Co.*, 124 Mo. App. 461, 101 S. W. 684, that the matter concerning which the wife was there permitted to testify did not grow out of, nor was it connected with, any business transaction conducted by the wife as the agent of her husband. That is the fact here. The attention of the wife to the house or farm in the absence of her husband was no more than that given by the husband in the *Gardner* case to the care of the property of the wife. It did not make her his agent. [See also *White v. Chaney*, 20 Mo. App. 389; *City of Joplin ex rel. v. Freeman*, 125 Mo. App. 717, 103 S. W. 130.] On the authority of these decisions, therefore, we must hold that the wife was not competent by reason of being the agent of the husband to testify provided the husband had been a party to this suit.

Here the husband is not a party of record; hence this case is not within the statute. But he was the assignor of the cause of action. If it is true that he is the real party in interest as to any surplus over and above the amount of the insurance, there would be no doubt that at common law neither he nor his wife are competent. [Starkie on Evidence (9 Ed.), p. 129, sec. 126, note q.] While our statute has abolished interest as a disqualification of a witness, it has not abolished the common law disqualification of the wife, save as to the exceptions in the statute. [White v. Chaney, *supra*.] Section 6359, *supra*, is an enabling statute, grafting exceptions upon the common law and the exceptions there made are the only exceptions to the common law so far as qualifies the wife as a witness. Unless she comes within these exceptions, she cannot testify when the husband is a party in interest, whether a party to the action or not. [See White v. Chaney, *supra*.] When Mr. Maddock, the assignor of plaintiff, was being examined, counsel for respondent, plaintiff below, offered and undertook to prove that he had an interest in any surplus which might be realized in this action over and above the amount paid by the insurance company to him. Counsel for defendant objected to this, because Maddock is not a party and it is immaterial, and on his objection the testimony was excluded. There is then, nothing in the record to show that Maddock has any pecuniary interest in the result of the action, and there was no claim made that the testimony of the wife should be excluded for that reason. While it was error to admit her evidence on the theory upon which it was offered and admitted, that is, on the theory of agency, there being no evidence that the husband was interested, she was a competent witness. Hence we cannot hold that it was reversible error to permit her to testify.

Counsel for appellant urge that the fact of agency could not be proven by the testimony of the husband

or the wife, citing Wheeler & Wilson Mfg. Co. v. Tinsley, 75 Mo. 458, in support of this. The decisions in that case and in Williams v. Williams, 67 Mo. 661, do so hold, but in Leete v. State Bank of St. Louis, 115 Mo. 184, l. c. 204, 21 S. W. 788, that decision as well as that in Williams v. Williams were disapproved by the Supreme Court as to this point, our Supreme Court holding that husband and wife were competent witnesses to prove agency of the other.

It is further claimed under this assignment that it was error to allow what is called the opinion evidence of a Mrs. Knoll as to whether sparks from the fire in the yard could have ignited the roof, to stand, appellant having moved to exclude this testimony. We see no error in the action of the court in overruling that motion; her testimony was not mere opinion evidence, but of a fact.

The third error assigned is to giving the instructions at the instance of plaintiff allowing recovery for the whole loss by the fire, appellant contending that the amount of the recovery should be confined to the amount the insurance company, the assignee, had paid to Maddock, the owner. That contention is untenable. This is not an action by one subrogated to the rights of the insured under the policy but as an action by plaintiff, as assignee of a chose in action. The measure of recovery in this case is the full amount of the damage sustained, within the amount stated in the petition, and irrespective of the amount which might have been recovered under the insurance policy.

The fourth assignment of error is to remarks said to have been made by counsel for respondent in his closing address to the jury, and claimed to have been injurious and prejudicial to the defendant. As appears by the bill of exceptions, in a closing address to the jury, one of the counsel for plaintiff said, in substance and effect, "that though plaintiff had paid only \$558 to Maddock, yet plaintiff had been by the defend-

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ant compelled to come into court and suffer delay and expense in enforcing its (plaintiff's) claim." It appears that these remarks were made by that counsel in answer to the argument of counsel for the appellant that as the insurance company had paid Maddock \$558.85 as insurance money for the damage and destruction of the property which had been damaged and destroyed by fire of an engine in use upon defendant's track, that plaintiff should not be allowed to recover more than that. Clearly counsel for defendant, appellant here, by his statement invited some such answer. Apart from that, plaintiff sued for \$900; the verdict was for \$636. The lowest estimate placed upon the buildings destroyed was \$600, and considering the value of the personal property destroyed, placed at about thirty-two dollars, and interest from the time of the bringing of the action until the judgment, we are unable to see that this produced any injurious effect whatever upon the jury. On the whole we are unable to see any reversible error in this cause.

The judgment of the circuit court is affirmed. *Norton* and *Allen, JJ.*, concur.

CHRISTIANE LAUMEIER et al., Respondents, v.
CLIFFORD M. DOLPH et al., Appellants.

St. Louis Court of Appeals, February 4, 1913.

1. **OPINION OF SPRINGFIELD COURT OF APPEALS ADOPTED.** The opinion of the Springfield Court of Appeals in this case (145 Mo. App. 78) is adopted as the opinion of the court.
2. **PLEADING: Variance: Action on Joint Contract: Recovery on Several Contract.** Where, in an action against two or more defendants, the petition counts on a joint contract, but the evidence discloses a contract with only one of the defendants, a recovery may be had against such defendant.

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Laumeier v. Dolph.

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen, Judge.*

AFFIRMED.

Frank K. Ryan for appellants.

Schnurmacher & Rassieur for respondents.

REYNOLDS, P. J.—This case has had rather an eventful passage through the courts. It was tried in the circuit court of the city of St. Louis, resulting in a verdict for plaintiff in the sum of \$6000 against the defendant Dolph. That defendant appealed to the Supreme Court, but pending the submission of the cause to that court, the jurisdiction of the Courts of Appeals was increased to \$7500, whereupon the Supreme Court transferred it to this court. Following the provisions of the Act of June 12, 1909 (Laws 1909, p. 396, now Sec. 3939, R. S. 1909), the cause was transferred from this court to the Springfield Court of Appeals. There it was argued, the judgment of the circuit court affirmed but the cause certified to the Supreme Court, the decision being in conflict with a decision of the Kansas City Court of Appeals in Meyers v. Missouri, Kansas & Texas Ry. Co., 120 Mo. App. 288, 96 S. W. 737. The Supreme Court, having held that the act providing for transfer of cases from one Court of Appeals to another was unconstitutional, sent the case back to our court, where it has been submitted and argued.

On consideration, we hold that the statement of facts and conclusions of law, as set out by Judge Nixon, speaking for the Springfield Court of Appeals, and reported under the title, Laumeier et al. v. Dolph, 145 Mo. App. 78, 130 S. W. 360, are correct.

Meyers v. Missouri, Kansas & Texas Ry. Co., supra, rests upon that part of the decision in Bagnell

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Timber Co. v. Missouri, Kansas & Texas R. R. Co., 180 Mo. 420, l. c. 463, 79 S. W. 1130, which holds that when the petition charges a joint contract, the plaintiff must recover upon the theory of a joint contract, or not at all; that unless the evidence tends to support a joint contract, plaintiff cannot recover, notwithstanding the evidence may disclose a contract with one of the defendants alone. In that case, on a second appeal, the Supreme Court, 242 Mo. 11, l. c. 20 to 21, 145 S. W. 469, distinctly overruled that part of the former opinion. Following that, we accept and adopt the statement of facts and conclusions of law as set out by Judge NIXON, except as to the necessity of certification to the Supreme Court.

The judgment of the circuit court is affirmed. *Norton* and *Allen, JJ.*, concur.

SOUTH SIDE REALTY COMPANY, Respondent,
v. ST. LOUIS & SAN FRANCISCO RAILROAD
COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted June 4, 1912.
Opinion Filed February 4, 1913.

1. APPELLATE PRACTICE: Failure to Prosecute Appeal: Dismissal of Appeal. In an action in three counts, the finding was for defendant on two counts and for plaintiff on the other, and both parties appealed. Defendant filed an abstract of the record on its appeal, and plaintiff filed a supplemental abstract, setting out the verdict and reciting that he filed a motion for a new trial, which was overruled, and was granted an appeal. He also filed a "motion for leave to assign cross-errors." These were the only documents filed by him in the appellate court. Held, that plaintiff did not prosecute his cross-appeal, in compliance with the statutes and rules of the court, and that it should, therefore, be dismissed.

2. OPINION OF SPRINGFIELD COURT OF APPEALS ADOPTED. The opinion of the Springfield Court of Appeals in this case (154 Mo. App. 364) is adopted as the opinion of the court.

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Appeal from Cape Girardeau Court of Common Pleas.
—*Hon. R. G. Ranney*, Judge.

REVERSED AND REMANDED.

W. F. Evans and *Moses Whybark* for appellant.

M. A. Dempsey and *Frank Kelly* for respondent.

REYNOLDS, P. J.—The appeal in this case was originally taken to this court from the Cape Girardeau Court of Common Pleas, transferred to the Springfield Court of Appeals under what is now section 3939, Revised Statutes 1909, and on the Supreme Court declaring that section unconstitutional, transferred back to this court. The Springfield Court of Appeals, in an opinion by Judge NIXON, reversed and remanded the cause. [See *South Side Realty Co. v. St. Louis & San Francisco R. Co.*, 154 Mo. App. 364, 134 S. W. 1034.]

It will be noticed in the statement made by Judge NIXON that plaintiff attempted a cross-appeal but that the Springfield Court of Appeals held that no cross-appeal had been perfected by plaintiff, that consequently it had no appeal pending in that court, and that the only course open to the court was to dismiss the plaintiff's abortive appeal. After the case came back to this court from the Springfield Court of Appeals plaintiff filed what is designated "a motion to assign cross-error." That motion is as follows: "The respondent moves for leave to assign the following cross-errors, namely: The court erred in overruling the motion for new trial, filed by the South Side Realty Company." Beyond this plaintiff filed nothing our court; took no steps whatever to perfect any appeal. The case reached here from the Springfield Court of Appeals and was docketed on the 14th of March, 1911. It was on the call docket for June 10, 1911, continued from term to term until finally dock-

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eted for hearing June 4, 1912, on which latter date it was argued and submitted. Plaintiff has filed no bill of exceptions in this court, the only bill of exceptions before us not purporting to be a joint bill of exceptions, nor has it filed any bill of exceptions of its own. It is true that it had filed in the Springfield Court of Appeals what it calls a supplemental abstract of the record and that is also on file with us. Looking into that we find that the only matters in it are these: The verdict of the jury in following form:

"We, the jury, find the issues for the plaintiff, and assess his damages as follows:

No dollars on the first count.

No dollars on the second count.

\$1000 on the third count."

This is signed by the foreman. Below this is what is undoubtedly a form of verdict that was submitted to the jury by the court which reads:

"We, the jury, find the issues herein for the defendant as follows:

~~On the first count~~

~~On the second count~~

~~On the third count."~~

This is not signed by anyone and a line is drawn through as shown, indicating that the jury or the court had struck them out. It further appears by this supplemental abstract that on the same day upon which verdict was rendered, plaintiff filed its motion for a new trial which was overruled. No exceptions are noted. The motion is set out in full. Then follows this: "Now comes the plaintiff herein, by attorney, and files his affidavit for a cross-appeal in the cause and the court being satisfied that the same should be granted, orders said appeal granted to the St. Louis Court of Appeals. It is further ordered that said plaintiff be granted ninety days in which to file its bill of exceptions." Looking at the abstract of the record furnished and filed by the defendant, we find a motion

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for new trial filed by defendant set out in full, the entry showing that it was overruled and exception duly saved, motion in arrest filed by defendant set out in full, overruled and exception duly saved by defendant. Following this is the prayer and affidavit of defendant for an appeal to this court, an order granting the appeal, fixing the amount of the bond at \$3000, and granting defendant ten days to file the bond and ninety days in which to file its bill of exceptions and awarding a *supersedeas*. On the application of defendant it was granted an extension of time to file its bill of exceptions and within the time of the last extension appears this: "And the defendant now here presents to the court this, its bill of exceptions, and prays that the same may be signed and sealed by the court, ordered filed, filed, and made a part of the record in this cause, which is hereby accordingly done this first day of November, 1909." In due time defendant filed a certified copy of the judgment together with a certified copy of the order granting the appeal.

Thus it will be seen that while the plaintiff prayed an appeal, it never tendered any bill of exceptions. More than this, neither by plaintiff's own supplemental abstract, nor in any paper of abstract before us, does it anywhere appear that plaintiff saved any exception of any kind either to action of the court on instructions or to overruling its motion for a new trial. Beyond this supplemental abstract that we have referred to and this so-called "motion to assign cross-error," or, even call it an assignment of cross-error, plaintiff has filed nothing in this court. It is true that plaintiff shows by its supplemental abstract that it has taken an appeal. But it stopped there and has not prosecuted it. With every disposition to treat parties with liberality and so avoid throwing anyone out of court on naked technicalities, we are compelled to hold that plaintiff has not complied with either the statutes or the rules of this court and must be held

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not to have prosecuted its appeal; for that reason its appeal is dismissed.

Referring to the case on its merits, we accept the statement of facts and conclusions of law thereon set out by Judge NIXON and before referred to as correct, and adopt them as the statement of facts and conclusions of law of this court.

The judgment of the Cape Girardeau Court of Common Pleas in this case is reversed and the cause remanded for further proceedings. *Nortoni* and *Allen, JJ.*, concur.

HENRY KRIBS, Appellant, v. UNITED ORDER OF FORESTERS, Respondent.

St. Louis Court of Appeals, February 4, 1913.

FRATERNAL BENEFICIARY ASSOCIATIONS: Establishing

Status: Burden of Proof. A foreign corporation, sued on a life insurance policy, which sets up in its answer that it was organized as a fraternal beneficiary association and was admitted to do business in this State as such, under article 10, chapter 33, Revised Statutes 1909, has the burden of establishing such allegation, and, in the absence of proof thereof, it is error for the trial court to direct a verdict for such corporation on the theory that it is entitled to the rights and immunities granted to fraternal beneficiary associations by the statute.

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen, Judge.*

REVERSED AND REMANDED.

Conrad Paeben and Joseph A. Wright for appellant.

Although the answer alleges defendant had been authorized since 1902 to do business in Missouri as a foreign fraternal beneficiary society, that allegation is

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specifically denied in the reply. The record is barren of any evidence that defendant had been thus admitted in Missouri. Under these circumstances, defendant cannot claim any of the rights or immunities of a fraternal order. *Thompson v. Royal Neighbors of America*, 154 Mo. App. 109; *Orderheide v. M. B. A.*, 158 Mo. App. 677; *Schmidt v. United Order of Foresters*, 228 Mo. 675.

Robert & Robert for respondent.

(1) (a) The defendant is a fraternal organization conducting its business on the lodge system, with representative form of government, with ritualistic form of work, and limiting its certificate holders to its own members and provides for the relief of its members' families, widows, orphans and kindred dependents from the proceeds of assessments upon its members. Hence the statutes relating to assessment companies do not apply to it. R. S. 1909, sec. 6962; R. S. 1909, secs. 7109-7121. (b) The petition states that defendant is a foreign corporation doing business in Missouri under and by virtue of the laws of Missouri. And the evidence of plaintiff shows that it is "organized and carried on for the sole benefit of its members and not for profit;" that it has "a lodge system with ritualistic form of work and representative form of government;" that it provides that "death benefits shall be to the families, heirs, blood relatives, affianced husband or wife or to persons dependent upon the member." R. S. 1909, sec. 7109. (2) (a) Foreign corporations are presumed to have complied with the law of this State and the burden of proof was on plaintiff to show noncompliance. *Shoe Mchy. Co. v. Ramlose*, 210 Mo. 649; *Insurance Co. v. Smith*, 73 Mo. 368; *State to use v. Hudson*, 86 Mo. App. 501; *Parlin v. Boatman*, 84 Mo. App. 67. (b) But as plaintiff alleged that defendant was "doing business under and by

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virtue of the laws of the State of Missouri," he is estopped to deny that fact now.

REYNOLDS, P. J.—It is averred in the petition in this case that defendant is and was at all times in the petition mentioned, a corporation duly organized and existing under the laws of the State of Wisconsin and doing a life insurance business in Missouri as a foreign corporation under and by virtue of the laws of the State of Missouri. Three several contracts or certificates are then set up, all dated October 19, 1908, by each of which the defendant agreed that upon the death of William F. Kribs, while a member in good standing, to pay the beneficiaries named the sum of \$1000, in the proportions specified; that is to say, two-thirds to the plaintiff Henry Kribs, an uncle, and one-third to Lizzie Gibson, an aunt of William Kribs, it being averred that Lizzie Gibson had assigned her right and interest to plaintiff, appellant here. Judgment is prayed on each of the certificates in the sum of \$1000, a total of \$3000.

The answer as to all three counts admits that the defendant is a corporation duly organized and existing under the laws of the State of Wisconsin but denies that it is transacting a life insurance business in Missouri as a foreign corporation but states that it is organized and incorporated as a fraternal benefit society on the lodge system, with ritualistic form of work for the sole benefit of its members and beneficiaries and not for profit, on the assessment plan and to insure the lives of its members, furnish relief and insurance protection to its indigent and disabled members and their beneficiaries and to promote morality, patriotism and good citizenship. It is further averred that it was admitted to do business in the State of Missouri on the 6th of January, 1902, under and by virtue of the statutes of the State of Missouri, chapter 12, article 11, Revised Statutes 1899 (now article 10,

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chapter 33, Revised Statutes 1909), and has since that time and at all times thereafter complied with those statutes and has been duly licensed for said purpose under those statutes.

A reply was filed to this in which the plaintiff denies that the defendant is a fraternal beneficiary society; denies that the defendant was admitted to do business in the State of Missouri, January 6, 1902, under and by virtue of the statutes of the State of Missouri, chapter 12, article 11, Revised Statutes 1899, and denies that it has since that time complied with those statutes and been duly licensed for that purpose under those statutes.

Plaintiff introduced in evidence the certificates which had been issued to him and his assignor; introduced the articles of incorporation, constitution and by-laws of defendant and the application of Kribs for membership; also evidence of the assignment and of the death of Kribs, as well as other evidence showing the financial condition of the defendant. But he made no admission whatever and introduced no evidence tending to show that the defendant corporation, admittedly a foreign corporation, had ever complied with the provisions of the statutes of this State governing the admission of foreign benevolent or assessment corporations into this State. The defendant introduced no evidence whatever.

At the conclusion of plaintiff's evidence the court instructed the jury that plaintiff could not recover. Whereupon plaintiff took a nonsuit with leave to move to set it aside. Filing that motion and saving exception to it being overruled, plaintiff has duly appealed to this court.

Among other assignments of error by appellant is this: That although the answer alleges defendant had been authorized since 1902 to do business in Missouri as a foreign fraternal beneficiary society, that allegation is specifically denied in the reply. It is

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claimed that the record is barren of any evidence that defendant had been thus admitted to do insurance business in Missouri, as either an assessment or benevolent association. Hence appellant claims that the defendant cannot set up any of the rights or immunities of either an assessment or a fraternal order.

We think this assignment is well taken. Admittedly the defendant is a foreign corporation. There is no evidence whatever that it is authorized to do any kind of business in this State. We are therefore bound to treat its business as insurance and its policies or its certificates issued in this State, as falling under the laws applicable to regular insurance companies or to insurance companies incorporated under the laws of this State and doing business on the assessment plan. To avail itself of the provisions of article 11, it is necessary for it to appear that it possessed the license and authority to do business in this State at the time when the contracts were entered into between it and the plaintiff. As this was neither admitted nor proven and as the evidence was admitted by the trial court and evidently construed by the learned trial judge on the theory that this was a corporation authorized to do business in this State as a benevolent association, and entitled therefore to have the laws relating to such corporations applied to the construction of its contracts, we cannot sustain the finding and judgment of the trial court. The case of Schmidt v. Supreme Court United Order of Foresters (this very same organization), 228 Mo. 675, 129 S. W. 653, is conclusive on this proposition. In this view of the case, it is unnecessary to notice other assignments of error.

The judgment of the circuit court is reversed and the cause remanded. *Nortoni* and *Allen, JJ.*, concur.

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JOHN W. HOWELL, Administrator, Respondent, v.
ST. LOUIS & HANNIBAL RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, February 4, 1913.

1. **ACTIONS: Ex Delicto and Ex Contractu: Distinction.** While the forms of civil actions have been abolished in this State, the distinction between actions for tort and for breach of contract is observed.
2. **DAMAGES: Breach of Contract.** The party committing a breach of a contract is liable for such damages only as arise from such breach itself, according to the usual course of things, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.
3. **COMMON CARRIERS: Breach of Contract of Carriage: Damages: Facts Stated.** A shipper was promised by defendant railroad company a certain kind of a car in which to load and ship mules to market, and, upon being advised by defendant's station agent that the car would be at the station at the appointed time, drove the mules there, but found, on arrival, that the character of car stipulated for was not there and that the car tendered was unsafe. He refused to ship in this car, and, refusing also to wait for another car which would be brought in on another train, drove the mules back to the farm where he had been keeping them, several miles distant, and from there drove them to another station on another railroad, from which point they were shipped, arriving, however, too late for the market for which he intended them and in a gaunt and stiff condition. In an action for damages for breach of the contract to furnish the kind of car stipulated for, all of the elements of damages counted on were eliminated from the case by instructions, except the claim arising from the driving of the mules from defendant's station to the farm and from there to the other station. *Held*, under these facts, that the expense of driving the mules from defendant's station to the farm and the depreciation in value caused by that drive were the only damages plaintiff was entitled to recover; *held, further*, that plaintiff was not entitled to recover for shrinkage in value of the mules by reason of driving them from the farm to the station on the other railroad, since this matter and its effect were things not within the reasonable contemplation of the parties to the contract.

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4. **APPELLATE PRACTICE: Matters Reviewable.** Where an element of damages counted on is withdrawn from the consideration of the jury by an instruction given at defendant's request, and plaintiff does not appeal, such matter is not before the appellate court for consideration, on defendant's appeal.
5. **COMMON CARRIERS: Breach of Contract of Carriage: Damages.** Three things might reasonably be anticipated as the result of the breach of a contract by a carrier to furnish a shipper with a certain kind of a car, namely: delay in reaching the market; expense incident to the delay; and loss of the market for which the shipment was intended.
6. **APPELLATE PRACTICE: Erroneous Theory of Damages: Disposition of Case on Appeal.** In an action against a carrier for breach of a contract of carriage, where the trial court erroneously permitted a recovery for certain elements of damages, the appellate court *ordered* that the judgment be reversed and the cause remanded with directions to the trial court to ascertain the amount of damages, if any, that plaintiff was entitled to recover on the elements of damages for which a recovery could be had, and to enter judgment therefor.

Appeal from Ralls Circuit Court.—*Hon. David H. Eby, Judge.*

REVERSED AND REMANDED (with directions).

R. F. Roy and J. D. Hostetter for appellant.

Defendant, if liable at all, could only be held liable for the natural proximate and probable consequence of its failure to furnish plaintiff a suitable car for the shipment of said mules; and it could not be held liable for any damages resulting from the alleged breach of its contract which could not have been reasonably foreseen or expected. *Commission Co. v. Railroad*, 113 Mo. App. 544; *Hyatt v. Railroad*, 19 Mo. App. 300; *Pruitt v. Railroad*, 62 Mo. 527; *Mendock v. Railroad*, 133 Mass. 15; *Walsh v. Railroad*, 42 Wis. 34; *Ballentine v. Railroad*, 40 Mo. 491; *Hobbs v. Railroad*, 10 Law Rep. (Q. B.) 111.

J. O. Allison and E. L. Alford for respondent.

The defendant failed to furnish the car as it had contracted with plaintiff to do. Plaintiff's damages were the natural result thereof and the result to be expected, and the plaintiff is entitled to recover. Baker v. Railroad, 91 Mo. 152; Pruitt v. Railroad, 62 Mo. 527; Harrison v. Railroad, 74 Mo. 364.

STATEMENT.—Plaintiff below, a mule buyer, assembled twenty large, fat mules at the farm of a Mr. Elzea about seven miles from Frankford, a station on defendant's railroad. On the night of Thursday, the 19th of October, 1905, Elzea called up the station agent at Frankford and told him that he wanted a stock car, thirty-six feet long, with drop door. The agent said “‘All right,’ he would have it by Saturday morning;” that it would be there in time, ready to go on the down train going south toward St. Louis. It is fairly to be inferred from the evidence that the station agent knew that the intention was to attach the car to a regular freight train that passes Frankford about 12:20 in the afternoon and usually carries live stock from Frankford to the National Stock Yards at East St. Louis, Illinois. On the following Saturday, Elzea, plaintiff being with him, called up the agent before they started with the mules to know whether the car was there. The agent answered that it was not but would be there and to come on with the mules. Thereupon they started from the farm with these twenty head of mules for Frankford. It appears that directly after this last conversation, which was over the telephone, the agent learned that there was no thirty-six-foot car at the disposal of defendant and he attempted to notify plaintiff of that, but plaintiff and Elzea had already started with the drove and could not be reached. When Elzea and plaintiff arrived at the station with the mules, they found that instead of

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a thirty-six-foot stock car being there ready for them, there was an ordinary stock car thirty-four feet long and with one of the doors, apparently on the side from which it was to be loaded, broken off. Plaintiff objected to the car because it was too short and because there was no door to it. The station agent told plaintiff that he could fix boards across that would be perfectly safe but plaintiff declined to accept this, saying it could not be done with safety. There is some conflict here between the testimony of plaintiff and that for defendant, plaintiff's testimony, which in the light of the verdict we must accept as true, is that the station agent declined to give him any satisfaction as to when he would have another car there and declined to furnish a thirty-six-foot stock car; according to the testimony of the station agent, he told plaintiff that defendant had no thirty-six-foot stock cars, but if he would wait until the following train, which would come along a few hours later that afternoon, there would be a thirty-four-foot stock car on it in good order which would be at the service of plaintiff. At all events and according to the testimony of plaintiff himself, when he did not find the car that he expected, and that he claimed he had ordered, at the station on Saturday morning, and found that the car which was there would not suit and was not safe to load his mules in, plaintiff became angry, drove his mules back to Elzea's farm, kept them there that night and the next morning drove them to Vandalia, a station on the Chicago & Alton Railroad, and thence shipped them to the National Stock Yards at East St. Louis.

It is in evidence that if the mules had been shipped over the defendant's road on the morning of the 21st of October, Saturday, they would have reached the National Stock Yards sometime Sunday morning in time and condition to be offered on the market there Monday morning, but that going by the route which they did, they arrived at the National Stock Yards on Monday

morning, stiffened and gaunt from their trip and not in condition to be put on the market that morning, the market closing somewhere about noon of each day. Plaintiff in his petition avers that the value of the mules on the market at East St. Louis on October 24th, the day when they were sold was "about seven dollars per head lower" than the market at such place for such mules on Monday, the 23d, the market on which said mules were intended to be sold. There is no evidence as to any difference in that market for mules on these dates, nor that these mules were sold at a less price than would have been realized for them if they had arrived on time and in ordinarily good condition.

In his petition in the case plaintiff claimed that on the failure of defendant to provide a stock car of the kind ordered, he had driven the mules back from Frankford to the farm, a distance of seven miles, and from the farm to Vandalia, a distance of between eighteen and nineteen miles, and that the shrinkage in value of the mules was by reason of this drive. He also claimed that he had expended a large amount of money for extra feed for the mules and for labor in caring for them, to-wit, fifty dollars, and he claimed damages in the sum of \$430. At the trial of the case plaintiff and his witnesses were permitted, over the objection and exception of defendant, to describe the extra travel from Frankford to the farm and from the farm to Vandalia and to give their opinion as to how much, in their judgment, the mules had been damaged per head "by reason of the drive" from Frankford to Vandalia over the road which was taken and after describing the drive these witnesses placed the damages at from fifteen to twenty dollars a head.

The court at the instance of plaintiff gave two instructions. By the first instruction, which we refer to as set out by respondent in his additional abstract, the court told the jury that if they found from the evidence

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in the case that on or about the 19th of October, plaintiff made application to defendant through its agent in charge of its station at Frankford, Missouri, to furnish him with a thirty-six-foot car, suitable for the shipment of a carload of large, fat mules from Frankford to the National Stock Yards in Illinois, the car to be placed at the disposal of plaintiff at defendant's station at Frankford not later than Saturday morning, October 21st, so that the mules could be shipped over defendant's railroad to the National Stock Yards, and that plaintiff agreed to deliver the mules at defendant's stock pen at Frankford on that date, and that defendant, through its agent at Frankford, agreed to furnish the car to plaintiff at the time and place and for the purpose for which plaintiff had made the application, if any, and if the jury further found that plaintiff brought a carload of large, fat mules, consisting of twenty head, to defendant's stock pens in Frankford, for shipment on this 21st of October, and that defendant failed to furnish such car and failed to furnish any car suitable for the shipment of the mules or in which the mules could be shipped on that day, but furnished in lieu of such car a car which was unsuitable, unsafe and unfit for the shipment of the mules, if the jury so found, and if the defendant through its agent, after the mules had been placed in defendant's stock pens at Frankford, declined to give plaintiff any assurance that a suitable car would be furnished him at any time for the shipment of the mules, and if the jury found and believed that by reason of the failure of defendant to furnish plaintiff with such suitable car, and by reason of defendant's failure, if any, to give plaintiff any assurance that such car would be furnished him at any time for the shipment of the mules, plaintiff was compelled, in order to care for the mules and properly ship them to the National Stock Yards, to drive them back to the farm and thence to

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Vandalia, for shipment to the National Stock Yards, Illinois, and if the jury further found that Vandalia was the most practicable and convenient point to which the mules could be driven for shipment to the National Stock Yards, and if the jury believed and found that in driving the mules from Frankford to the farm mentioned and thence to Vandalia, plaintiff exercised that degree of care for the mules that a careful and prudent person, experienced in the handling of such stock, would have exercised under the same or similar conditions and circumstances, and that by reason of and as the result of the drive from Frankford to Vandalia the mules were made sore, jaded and gaunt and were injured and damaged thereby, the verdict should be for plaintiff, provided the jury further found that the station agent at Frankford was, at the time of the alleged contract, the agent in charge of defendant's freight shipping business at that point, and that as such station agent he transacted all of defendant's business at that point in the shipment of live stock from that point and in obtaining cars for shippers of live stock in carload lots, and that the making of the alleged contract with plaintiff was within the apparent scope of his authority as such station agent.

The second instruction told the jury that if they found for plaintiff, in assessing damages they should take into consideration the injuries and damages to the mules, if any, by reason of being made sore, jaded and gaunt, if so the jury found they were, and which were the direct results of driving them from Frankford to the farm from which they had been brought and thence to Vandalia, and the consequent depreciation, if any, in the market value of the mules, and the jury should assess his damages at such sum as will compensate him for such depreciation, if any, in the market value of the mules at the National Stock Yards, not exceeding the sum of \$430.

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At the close of the testimony for plaintiff, as well as at the close of all the testimony in the case, defendant asked the court to instruct the jury that under the law and the evidence in the case plaintiff was not entitled to recover. These were refused, defendant saving his exception.

Defendant also asked the court to instruct the jury that if they found for plaintiff they should assess his damages at the sum of one cent, which instruction the court refused to give, defendant excepting.

Defendant asked the court to instruct the jury that defendant was not liable for the injuries, if any, caused to the mules by driving them from Elzea's farm to Frankford or by driving them from Frankford to Elzea's farm or for any damages by reason of driving the mules from Elzea's farm to Vandalia, defendant excepting to the refusal of these instructions.

At the instance of defendant, however, the court instructed the jury that defendant could not be held liable in this action for damages resulting to plaintiff's mules while they were in charge of the Chicago & Alton Railroad Company, whether such damages consisted in making the mules gaunt and stiff or sore or otherwise and that in no event was plaintiff entitled to recover anything for extra feed for the mules.

The court further instructed the jury at the instance of defendant that there was no evidence in the case to show any depreciation in the market value of the mules by reason of any fall in the market price of the mules in general between the time when the mules were in defendant's pens at Frankford and the time of their arrival at the National Stock Yards at East St. Louis, nor was plaintiff entitled to any damages resulting to the mules by reason of their being taken from Elzea's farm to Frankford and placed in defendant's stock pens.

The jury returned a verdict for plaintiff, assessing his damages at \$240, and also ten dollars for extra expense. Pending action on the motion for new trial, which was interposed by defendant, plaintiff remitted this ten dollars for extra expense. A motion for new trial being interposed and overruled, on this remittitur being made, defendant duly perfected appeal to this court. Pending the appeal, plaintiff died and that being suggested and his administrator appearing was duly substituted as respondent.

REYNOLDS, P. J. (after stating the facts).—It will be seen that this is an action upon a contract for damages for its breach, not one in tort; that it is an action to recover the actual damages sustained for the breach of the contract to furnish a car of certain dimensions at a certain time and place. While the forms of civil actions have been abolished in our State, the distinction between actions for tort and for breach of a contract is observed. Referring to these actions, an accepted authority, quoting from 1 Sutherland on Damages, p. 74 (1 Sutherland, 3 Ed., p. 134), has said: “An important distinction is to be noticed between the extent of responsibility for a tort and that for breach of a contract. The wrongdoer is answerable for all the injurious consequences of his tortious act which, according to the usual course of events and the general experience, were likely to ensue, and which, therefore, when the act was committed, he may reasonably be supposed to have foreseen and anticipated. But for breaches of contract the parties are not chargeable with damages on this principle. Whatever foresight, at the time of the breach, the defaulting party may have of the probable consequences, he is not generally held for that reason to any greater responsibility; he is liable only for the direct consequence of the breach, such as usually occur from the breach of such a contract, and as were within the contemplation of the parties, when

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the contract was entered into, as likely to result from a breach." [3 Hutchinson on Carriers (3 Ed.), sec. 1358, p. 1609.]

In Melson v. Western Union Telegraph Co., 72 Mo. App. 111, Judge ELLISON, speaking for the Kansas City Court of Appeals, at pages 114 and 115, has quoted at length from Hadley et al. v. Baxendale et al., a decision rendered in 1854 in the Court of Exchequer, the opinion by Baron ALDERSON, reported 9 Exchequer Reports (Welsby, Hurlstone & Gordon) 341, l. c. 353, the rule for the admeasurement of damages, applicable to actions for a breach of contract. It is not necessary to set this rule out in full here, Judge ELLISON having quoted it as above noted, it being sufficient to say that it is to the effect that where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. This has always been recognized in our State as a correct statement of the rule for the admeasurement of damages, in actions for breach of contract. [See Ballentine v. North Missouri Railroad Co., 40 Mo. 491, l. c. 505; Nelson v. Western Union Telegraph Co., *supra*.]

Let us see how that rule applies to the facts here. Counsel have referred us to no case which falls directly within the facts here, nor have we, on a somewhat careful and laborious search of the authorities, been able to find any case that exactly corresponds in its facts to the one before us.

Irvine v. The Midland Great Western Railway (Ireland) Company, before the Exchequer Division of

the Court of Appeals in Ireland, 6 Irish Law Reports (1880-81) 55, throws some light upon the application of *Hadley v. Baxendale* to a case somewhat similar to the one before us. There the default of the defendant, the railway company, was the neglect or refusal to provide the large, open wagons, cars as we call them, contracted for and which the jury found were to be capable of containing four tons each, or, as Baron FITZGERALD, who delivered the opinion said, "if you will, the refusal to carry the hay in such wagons at the price agreed on." The defendant had paid a certain sum into court, as covering extra cost of transportation, denying that it was liable for any further damages. The jury, under the direction of the trial judge, had fixed the damages at a sum largely in excess of that amount. On the appeal it was contended by counsel for the defendant that the proper measure of damages was the extra cost of carriage, if any, occasioned by the defendant's breach of the contract in not supplying cars of the kind in contemplation and contracted for. Passing on this contention Baron FITZGERALD said (l. c. 63) that there could be no doubt that the general intention of the law in giving damages in an action of contract is, to place the party complaining, so far as this can be done by money, in the same position as he would have been in if the contract had been performed; that if, in the case before the court, the contract had been duly performed plaintiff might, according to the finding of the jury, have sold his hay at the point of destination at a profit considerably over the amount of the deposit and which larger amount had been allowed by the jury. "But," says Baron FITZGERALD, "in applying this general intention of placing the complainant in the same position as he would have been in if the contract had been performed, to a case like the present, we must remember that the altered position to be redressed must be one directly resulting from the breach, and not from any

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act or omission of the complainant subsequent to the breach, and not directly attributable to it. It is not sufficient that it be an act or omission which would not in fact have taken place but for the breach. If the plaintiff here, after there had been a complete breach of the contract, had burned the hay, then in order to put him in the same position as he would have been in if the contract had been performed, the jury might have given him the whole (value of the hay) as well as the profit ascertained by the judge; but such an application of the general intention of the law would be manifestly absurd." Baron FITZGERALD then argues that the plaintiff might have had his hay conveyed in the ordinary cars of the company, to which, according to his own evidence, there was no objection except the price, and might have had the hay at the point of destination while the price was still at the figure when he first expected to have the hay reach there and so would have suffered no loss whatever except as to the difference of freight, which he could have recovered against the defendant as damages. The conclusion was that the sum deposited by defendant more than covered the extra cost of carriage, which was all for which plaintiff could recover.

In *Gulf, Colorado & Santa Fe Ry. Co. v. Martin*, 28 S. W. 576 (not found in the official reports), the Court of Civil Appeals of Texas held that the measure of damages for the breach of a contract for furnishing cars for the shipment of cattle which compelled plaintiff to cancel the contract for their sale whereby he lost the opportunity of putting them on the market for that season, was the difference between the reasonable value when under herd at the contemplated time and place of shipment and the amount stipulated in the contract of sale.

In *Gulf, Colorado & Santa Fe Ry. Co. v. Hodge & Long*, 10 Tex. Civ. App. 543, 30 S. W. 829, an action for damages for breach of contract to furnish cars on

which machinery was to be shipped, the court held that the shipper could not recover either for profits lost or for expenses on the part of plaintiff under the contract.

In Laurent v. Vaughn, 30 Vt. 90, the rule of damages for failure to furnish transportation contracted for was said to be the difference between the value of the goods at the place they were delivered and the value at the place to which they were contracted to be delivered, the court applying the rule that the damages recoverable are such as should have been contemplated by the parties at the time of making the contract.

In Grund v. Pendergast, 58 Barb. (N. Y.) 216, citing Ogden v. Marshall, 4 Seld. 340, it is held that where a party can secure transportation of his goods by carrier other than the one with which he has contracted, it is not only within his right but it is his duty to do so, in which case he is entitled to recover the difference, if any, between the price at which the defendant had undertaken to carry the goods and the price which plaintiff was compelled to pay the other carrier for its transportation. To the same effect see Gilchrist v. Lumberman's Min. Co., 55 Fed. Rep. 677, 5 C. C. A. 239. It seems also that if between the time of the two shipments there had been a shrinkage or deterioration in value of the mules by reason of the delay involved, the amount of that could be taken into consideration in determining the damages. [See Ayres v. Chicago & Northwestern R. Co., 71 Wis. 372, l. c. 383. See, also, Chicago & Alton R. Co. v. Erickson, 91 Ill. 613.]

It seems from these authorities that plaintiff could not recover for damages occasioned by the shrinkage in value of these mules by reason of the drive from the farm to Vandalia. This, on the ground that this driving and its effect were things not within the reasonable contemplation of the parties to the contract.

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Whether plaintiff could recover for extra feed for the mules is not before us, the court, at the instance of defendant having told the jury he could not, and plaintiff has not appealed. Plaintiff was allowed for the expense of driving from the station to Vandalia but he voluntarily remitted that.

What were the consequences reasonably to be anticipated by defendant for breach of the contract to furnish the car of the kind specified? Three things might reasonably have been anticipated as likely to result from the breach of the contract. First, a delay in reaching the market; second, expense incident to the delay; third, loss of the market for which they were intended. But on none of these were the damages claimed or allowed. It was for the alleged shrinkage in the value of the mules in consequence of this drive of some twenty-six miles that evidence was admitted over the objection and exception of defendant. The verdict of the jury was entirely founded upon the testimony as to depreciation in value caused by shrinkage in consequence of this drive. It is true that the jury added ten dollars for the expense attendant upon this driving, but this was remitted by plaintiff. It was on the theory that plaintiff could recover for this shrinkage from the drive that the trial court instructed the jury.

At the instance of defendant the jury were distinctly instructed that defendant was not liable for any injury to plaintiff's mules while in charge of the Chicago & Alton Railroad Company and that there was no evidence in the case to show any depreciation in the market value of the mules by reason of any fall in the market price of mules in general between the time when the mules were in defendant's pens at Frankford and the time of their arrival at the National Stock Yards at East St. Louis, and the jury were told that they should not allow plaintiff anything for such depreciation. They were specifically instructed also at

the instance of defendant that plaintiff was not entitled to recover any damages resulting to the mules by reason of their having been taken from Elzea's farm to Frankford and placed in defendant's stock pens. Hence all elements of damage were eliminated except those arising from the driving of the mules back from Frankford to the farm and from the farm to Vandalia.

Applying the principles to which we have referred as governing cases of this kind in a suit on a contract, we can arrive at no conclusion other than that the only damage that plaintiff was entitled to in the matter, under the facts in this case, are for any expense incurred in driving the mules from Frankford to Elzea's farm and any depreciation in the value of the mules by that drive. To this plaintiff is entitled and to no other damage or expense.

Other questions are raised by counsel for appellant but in the view we take of the case, it is not necessary to consider them.

It follows that the judgment in the case must be reversed and the cause remanded with directions to the circuit court to ascertain the amount, if any, of such damage and expense and enter judgment accordingly for plaintiff. *Nortoni* and *Allen, JJ.*, concur.

STATE ex rel. CLARA TAYLOR, Relator, v.
EUGENE MCQUILLIN, Judge, Respondent.

St. Louis Court of Appeals, February 4, 1913.

1. **INSANE PERSONS:** Inquisition De Lunatico: Appeal from Order Granting New Trial: Jurisdiction of Circuit Court. The circuit court has no jurisdiction of an appeal from an order of the probate court granting a new trial in an *inquisition de lunatico*.

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2. PROHIBITION: Prohibiting Circuit Court: Jurisdiction of Courts of Appeals. The courts of appeals have jurisdiction of a proceeding by prohibition to prevent a circuit court from undertaking to exercise jurisdiction of an appeal from an order of a probate court granting a new trial in an *inquisition de lunatico*.

Original Proceeding by Prohibition.

WRIT MADE ABSOLUTE.

George B. Webster for relator.

Randolph Laughlin for respondent.

REYNOLDS, P. J.—Some time in January, 1912, relator presented her petition in this court, setting up certain facts touching proceedings in the probate court in the city of St. Louis which had been instituted there to determine the question of sanity or insanity of relator. It is set out in the petition that those proceedings resulted in a verdict finding her mentally unsound. Relator here thereupon and at the same term of that court, filed a motion for new trial and the judge of that court, taking it under advisement, continued it to the succeeding term and at that term granted a new trial. An appeal was granted from this by the clerk of the probate court in vacation of that court, to the St. Louis Circuit Court. There the relator appeared and moved to dismiss the appeal on the ground that that court had no jurisdiction. The motion appears to have been sustained by the circuit court, although resisted by Louis Nolte, the then sheriff of the city of St. Louis, who had instituted the proceedings in the probate court to have relator declared insane. After the motion to dismiss had been sustained by the circuit court the sheriff tendered a bill of exceptions and prayed an appeal to the Supreme Court, injecting into his motion for an appeal or motion against the sustaining of the motion to dismiss, various provi-

sions of the Constitution of this State. The circuit judge refused to allow and sign this or to permit one signed by bystanders to be filed. Preceding that, however, and in the course of these proceedings in the circuit court, Miss Taylor, the relator here, presented to one of the judges of this court, in vacation and at chambers, her petition for a writ of prohibition directed to the circuit court, prohibiting it from further entertaining jurisdiction of the appeal. An alternative writ was issued and after that, the sheriff, Mr. Nolte, procured from the Supreme Court an alternative writ of mandamus requiring the judge of the circuit court, the Hon. EUGENE MCQUILLIN, to allow, sign and file the bill of exceptions which he had tendered to that court to the action of the court in dismissing the appeal. The facts connected with the whole case are so fully set out in the case of State ex rel. Nolte, Sheriff, et al. v. McQuillin, Judge, 246 Mo. 486, unofficially reported 151 S. W. 444, that it is entirely unnecessary to repeat them here. We refer to that for a full statement of them and of issues involved.

On the hearing of this case before the Supreme Court, as will be seen in the report of the case as above referred to, the Supreme Court vacated the alternative writ it had issued, and dismissed the case. Prior to the issue of the alternative writ of mandamus by the Supreme Court, the respondent judge made a return before us to which relators filed a reply, whereupon respondent filed a motion for judgment on the pleadings. As this motion is based entirely upon the claim that the case pending in the circuit court was beyond our jurisdiction on account of the constitutional questions which it was claimed had there been raised, while we allowed counsel to argue this case, which was done and the case finally submitted to us in February, 1912, we refused to pass upon it or take any further action in it until the determination of the case then pending before the Supreme Court. That decision, rendered

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November 26th, a motion for rehearing overruled December 10, 1912, has been recently brought to our attention. Considering it and guided by it, there is nothing further left in the contention of respondent. It is very clearly determined by the Supreme Court in that case of State ex rel. Nolte v. McQuillin, *supra*, that the circuit court was without jurisdiction to entertain an appeal from the probate court in its action granting a new trial in an *inquisition de lunatico*. The Supreme Court having further eliminated all the claim that constitutional questions were properly before it, the case is within our jurisdiction.

Following the decision of the Supreme Court In the Matter of Marquis, 85 Mo. 615, and of our own court In the Matter of Crouse, 140 Mo. App. 545, 120 S. W. 656, approved in State ex rel. Nolte, *supra*, we hold that the circuit court was without any jurisdiction in this matter.

When the character of the case before it was called to the attention of the circuit court, it should have at once dismissed the appeal and refused to take any further steps in it.

The alternative writ of prohibition heretofore issued is made absolute. *Norton* and *Allen, JJ.*, concur.

STATE ex rel. ALICE LaRUE, Relator, v. GEORGE C. HITCHCOCK, Judge, Respondent.

St. Louis Court of Appeals, February 4, 1913.

1. **MANDAMUS: Motion to Quash Writ: Admits Well-pleaded Facts.** A motion to quash an alternative writ of mandamus admits all the allegations that are well pleaded.
2. **COURT STENOGRAPHERS: Nature of Office: Officers.** A court stenographer, under the provisions of Sec. 11231 *et seq.*, R. S. 1909, is an officer of the court.

3. **STATUTES: Rules for Construction.** Statutes are to be construed together, and in construing them, the courts should have the whole body of the law in mind, harmonizing the provisions of the several statutes, if possible, and endeavoring to arrive at the intent of the lawmakers.
4. **PUBLIC POLICY: How Determined.** The public policy of the State is determined by its laws.
5. **COURT STENOGRAPHERS: Furnishing Free Transcripts to Poor Persons: Costs: Statutory Construction.** Sec. 2261, R. S. 1909, provides that the court may permit a party to prosecute an action as a poor person, in which case he shall have all necessary process without fees, tax or charge, and the court may assign counsel, who, as well as all other officers of the court, shall perform their duties without fee or award. Section 11233, which was enacted after section 2261 was enacted, provides that court stenographers shall receive for their services, in addition to a salary, certain fees from any person ordering a transcript of their notes. Sec. 11263, R. S. 1909 provides that a transcript of the evidence shall be furnished to the defendant in a criminal case, without cost to him, when the court is satisfied that he is unable to pay for the same, in which case the stenographer's fees shall be taxed as costs against the State or county. *Held*, that the provision for furnishing a transcript in criminal cases *gratis* is not a legislative construction of section 2261, so as to exempt stenographers from furnishing transcripts in civil cases to parties who are unable to pay for the same, under the principle "*expressio unius exclusio alterius est*"; *held, further*, that the provision in section 2261, requiring officers to perform their duties without fee or award for any party allowed to prosecute an action as a poor person, was not repealed by implication by section 11233, which provides for the payment of fees to stenographers, but both statutes should be considered together.
6. **STATUTES: Repeal by Implication.** A statute will not be held to have been impliedly repealed by a subsequently enacted statute, if it be possible to reconcile them with each other.
7. **COURT STENOGRAPHERS: Furnishing Free Transcripts to Poor Persons: Duty of Judge.** Sec. 2261, R. S. 1909, requiring officers of the court to perform their duties without fee or award for any party allowed to prosecute an action as a poor person, is applicable to court stenographers, as well as other officers of the court; and hence it is the duty of the judge, after having granted a party permission to sue as a poor person, to order the stenographer to furnish such party a transcript of the proceedings at the trial, without the payment of the fees chargeable therefor.

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8. _____: _____: _____: Form of Order: Costs and Fees. Where the trial court orders the stenographer to furnish a person allowed to sue as a poor person a transcript of the proceedings at the trial, without the payment of the fees chargeable therefor, the legal fees for doing such work are to be taxed in his favor and are recoverable in the event judgment be entered for plaintiff, as provided by Sec. 2261, R. S. 1909; and the order on the stenographer should so provide.
9. MANDAMUS: Free Transcripts to Poor Persons: Courts: Court Stenographers. A trial judge who refuses to order the court stenographer to furnish a transcript of the proceedings to a person allowed to sue as a poor person, without the payment of the fees chargeable therefor, will be required by mandamus to make such an order.

Original Proceeding by Mandamus.

WRIT MADE PEREMPTORY.

H. C. Whitehill for relator; *Charles P. Comer* of counsel.

George D. Harris for respondent.

STATEMENT.—The relator presented to one of the judges of our court, in vacation and at chambers, a petition for a writ of mandamus against the Hon. George C. Hitchcock, one of the judges of the circuit court of the city of St. Louis. In the petition for the writ it is set out that relator, as plaintiff, had brought her action against one Theodore T. Bland, as defendant; that that action was in due course assigned to the division of the circuit court of the city of St. Louis of which Hon. George C. Hitchcock was then judge presiding, and one A. C. Garber had been duly and regularly appointed and at the time mentioned was acting as the official stenographer of that division of the court; that after the bringing of the action and its assignment to the division mentioned, a motion for security for costs was filed, in opposition to which the plaintiff, relator here, filed her motion to sue as a poor person. The

latter motion coming on for hearing was sustained by the court, as provided by section 2261, Revised Statutes 1909. Thereafter and in due course the cause coming on for trial before the Hon. George C. Hitchcock, as judge, and a jury, and the evidence of the plaintiff, relator here, having been heard, the court announced that he would sustain a demurrer to the evidence, and plaintiff electing to stand on her evidence, the court sustained the demurrer and directed the clerk of the court to enter up judgment for defendant and discharged the jury from further consideration of the case without any verdict whatever having been returned by the jury and without a peremptory instruction for the jury to return a verdict in favor of defendant. That plaintiff, relator here, duly excepted to this action of the court and thereafter and in due time filed her motion for a new trial and to set aside the judgment, as well as a motion in arrest of judgment, all of which motions were overruled and exception saved. This at the June, 1912, term of the court. That during the same term plaintiff, relator here, filed her affidavit and prayed an appeal to this court, which appeal was allowed, plaintiff, relator here, being granted ninety days within which to file her bill of exceptions. That afterwards, and within that time plaintiff, petitioner here, applied through her attorney of record to Mr. Garber, the official court stenographer, for a full, complete and true transcript of the testimony in the cause, together with all exceptions thereto and rulings thereon; that Mr. Garber then and there refused and still refuses to furnish plaintiff, petitioner here, with such transcript unless she first pay him the fees and charges provided by law and which he claims he is entitled to receive for writing up and transcribing the testimony, notwithstanding the fact that the order allowing plaintiff, relator here, to sue as a poor person was still in force and had in nowise been set aside. That thereafter plaintiff, relator here, filed her motion,

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asking the court for an order on the court stenographer to furnish the transcript above mentioned without requiring relator to pay him any fees or charges therefor. This motion coming on for hearing was overruled by the court, plaintiff excepting. The court still refusing to make such order, as it is alleged, the relator here avers that it is necessary for her to have the stenographic notes written out as before mentioned; that they will be lengthy and require a large amount of money to pay the fees allowed by law for them and that it is absolutely necessary that she have the evidence and proceedings at the trial, including exceptions made by her to the several rulings in the course thereof written out in order that she may be able to present a complete transcript of the evidence and of the proceedings had at the trial to this court and to bring the cause before this court. Averring that she is a poor person without means or property of any kind and unable in any way to make payment of the fees claimed by the official court stenographer, and that neither she nor her counsel have it in their power to raise the money in payment therefor, and that the stenographer has in his possession all of the notes containing the testimony and objections thereto and rulings thereon and exceptions thereto and that unless the judge of the circuit court be ordered by this court to make an order commanding the stenographer to write them out and furnish them to plaintiff, relator here, she will be wholly unable to prepare a bill of exceptions and unable to have her appeal properly reviewed by this court and will be deprived of certain remedy for the injury to her property rights, as alleged, and will be denied and deprived of the due administration of right and justice, and averring that she is without other adequate remedy, relator prays for a writ of mandamus directing the Hon. George C. Hitchcock, as judge of the division of the court in

which the cause was tried, to require the official court stenographer to make out and furnish her, without cost, a full, true and complete transcript of all the testimony taken in the aforementioned cause, including the objections thereto, the rulings thereon and the exceptions thereto. The petition for the writ of mandamus is verified by the petitioner and attested by her counsel. An alternative writ was issued returnable into our court December 31, 1912. At the same time relator also filed her application in this court for leave to sue as a poor person. In due time the respondent appeared and for return to the alternative writ has filed a motion to quash it on the assigned ground that the petition is not sufficient in law. The case being passed from time to time it was suggested to the court that in the meantime the Hon. George C. Hitchcock had been transferred from Division No. 8 to another division of the circuit court and the court stenographer mentioned as acting in the former division had likewise been transferred to that division, and that by agreement of counsel, and consent of court, the cause had been transferred from the division to which it was formerly assigned to the one over which Judge Hitchcock now presides.

The motion to quash was duly submitted on oral arguments by the several counsel, they afterwards by leave also filing written arguments.

REYNOLDS, P. J. (after stating the facts).—Treating the motion to quash as a return and in the nature of a demurrer to the petition, it follows that all of the allegations of the petition which are well pleaded are taken as confessed, so that these things are admitted: That the petitioner had a cause pending in the circuit court; that she was allowed by that court, on due consideration, to prosecute her suit as a poor person under the provisions of section 2261, R. S. 1909; that her cause went to trial before the Hon.

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George C. Hitchcock and a jury, in the division of the circuit court over which that judge presided; that one A. C. Garber, having been duly appointed thereto, was at the time acting as stenographer in that division of the court; that the trial was had and that the testimony produced and all the proceedings at the trial were taken down in shorthand by him as the court stenographer; that demand having been made on him for a full copy of his notes written out in English in long-hand, he declined to make or furnish it unless his legal fees were first paid; that the circuit judge, on application for an order requiring the court stenographer to write out and deliver to the relator the copy of all the notes of the testimony taken and proceedings had at the trial, had declined to make such order; that the order allowing relator to sue as a poor person had never been revoked.

Counsel for the respective parties have furnished us with exceedingly elaborate briefs and arguments in support of their several positions. We have read and considered them carefully but do not deem it necessary to follow them in detail nor to notice all the points raised.

Under the practice as it existed prior to 1881, unless they were so fortunate in their clients or in their own financial conditions as to be able to employ stenographers or shorthand writers to attend them in court at the trial of causes, the testimony was taken down by the attorneys themselves in such manner as they best could; a few of them who were themselves skilled in shorthand-writing, taking it down in that form, and the bill of exceptions was made up from these notes of the testimony and proceedings at the trial, so taken down by the attorney, sometimes helped out by the notes which the judge himself may have taken down. Hence the attorneys had in their own hands the matter necessary for making up the bill of exceptions. This in a measure may account for the

former brevity of bills of exceptions, even of briefs, arguments, and opinions. The controversies that so often arose between counsel and sometimes between counsel and court over the settlement of the bill of exceptions were the occasion for the enactment of what are now sections 2030, 2031 and 2034 to 2037, then often, now rarely invoked. In the course of time, however, the art of stenography making great advances, and the use of the stenographer in the court being found to be a great saving of labor for the attorneys as well as for the judge, possibly also tending to accuracy, the office of court stenographer was created. Their first official recognition by law in our State was in 1881. At the session of the General Assembly in that year, by an Act approved March 19, 1881 (Laws 1881, p. 106), an act was passed authorizing the appointment of stenographic reporters in courts exercising criminal jurisdiction in cases of felonies in cities having a population of more than 100,000 inhabitants. They were made officers of the court, put under oath for the discharge of their duty, required to take down in shorthand and transcribe into legible English for the use of the State when so directed by the judge of the court, the proceedings attendant upon trials in cases of felonies. The shorthand notes taken down by the reporter were to be filed by him in the office of the clerk of the court and to become part of the record of the court and whenever required by the clerk to do so, the reporter was directed to transcribe them into longhand and in English, whereupon the clerk was to make out certified copies of the transcript for any person upon payment of the legal fees allowed by law for copies of other records and papers, provided that in cases of appeal and on motions for new trial the transcript of the evidence should be furnished to the defendant upon order of the court without cost to the defendant. Under this act the court stenographer received a monthly salary of \$150 and as will be noticed did not receive

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any fees for transcribing the notes or furnishing copies thereof to any person, fees for copies being collected by the clerk, he collecting the fees for them as in case of making copies of other records, the defendant being exempt from payment of any fees in cases of felonies. This act is substantially carried into our present revision of 1909, as article 5, chapter 131, with some changes not necessary now to be noted or pertinent to the consideration of this case. It was amended in 1907 by an act approved March 19th (Laws 1907, p. 440), which added to the end of the section the provision that when it appeared to the satisfaction of the court that the defendant was unable to pay the costs of the transcript for the purpose of taking the appeal, the stenographer should be allowed for making the transcript the sum of fifteen cents per folio of one hundred words for each transcript so furnished, and that when the court shall be satisfied that the defendant is unable to pay for making such transcript, the same shall be taxed as costs in the case against the State or county as may be proper.

The first law authorizing the appointment of stenographers in civil causes in the civil courts, was an Act approved March 31, 1887 (see Acts 1887, p. 145). That act was confined to courts in cities and counties having a population of 350,000 inhabitants or more. With amendments not necessary to be noted here that act is substantially article 1, chapter 113, Revised Statutes 1909. What is now article 2 of this chapter 113, first appears in the revision of 1889, as article 2, chapter 153. Article 3 of chapter 113, supra, was adopted in 1883 (see Laws 1883, p. 59), what is now section 11249 being added by the act of March 15, 1887 (Acts 1887, p. 160). With the recognition by our laws of a stenographer as an officer of the court, the whole matter of preparing bills of exceptions has been changed. Now bills of exceptions are made up from the notes of the court stenographer, written out in longhand by

him and embodied in the bill of exceptions, which when signed by the judge and filed, become a part of the record of the court in that cause. Instead, therefore, of the attorney relying upon his own notes in making up the bill of exceptions as in the old days and under the former practice, he almost necessarily must rely upon, in fact does rely upon, these transcribed notes of the court stenographer.

The first section of article 1, chapter 113, *supra*, section 11,231, Revised Statutes 1909, provides that "for the purpose of expediting the public business and preserving an accurate report of proceedings in the trial of causes without expensive delays, the judge of the circuit court, or when said court consists of more than one judge, then the judge of each division thereof, . . . is authorized to appoint one official stenographer for such court or division. Such stenographer shall be an officer of such court, and shall file therein an affidavit to discharge faithfully and impartially the duties of such office, and shall also file therein a bond to the State of Missouri, in the sum of \$3000, with two sureties approved by said judge, conditioned for the faithful and impartial discharge of such duties, upon which any person injured by breach thereof may maintain an action as upon other official bonds. Such stenographer shall hold his office until removed by an order of such judge or by an order of such judge appointing a successor."

The second section of this article, section 11232, Revised Statutes 1909, makes it the duty of the official reporter so appointed "to take full stenographic notes of the oral evidence offered in every case tried in said court or division, and of other proceedings when directed by said judge to be so reported, together with all objections to the admissibility of testimony and the rulings of the court thereon, and all exceptions taken to such rulings; to preserve all official notes taken in said court for future use or reference, and to

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finally deposit the same with the records of said court, according to the directions of the judge thereof; and to furnish to any person a longhand transcript of all or any required part of said evidence or oral proceedings upon the payment to him of the fees hereinafter provided."

The next section, section 11233, provides that the official stenographer shall receive the sum of \$1800 per year, payable in installments of \$150 at the end of each month of the year by the treasurer of the city wherein the court of which he is stenographer is situated, and that each stenographer shall also receive from any person ordering longhand transcripts of these notes such fees for the same as may be from time to time established by orders of the court or judge, not exceeding, however, fifteen cents per folio of one hundred words each; and that any judge of any court may, in his discretion, "order a transcript of all or any part of the evidence or oral proceedings for his own use, and the stenographer's fees for making the same shall be taxed in the same manner as other costs in the case."

The next section, section 11234, provides that in every case, except in suits by the State for the collection of delinquent taxes, where an official stenographer is appointed, the clerk of the court shall tax up the sum of three dollars, to be collected as other costs, and thereupon to be paid by the clerk to the city treasurer, to be applied to the salary of the stenographer.

That the court stenographer, under these provisions, is an officer of the court is clear. The language of section 11231 is unmistakable. There it is enacted: "Such stenographer shall be an officer of such court." He must file an affidavit "to discharge faithfully and impartially the duties of such office." He must file a bond to the State in a sum named "conditioned for the faithful and impartial discharge of such duties." In this section, as well as throughout the several articles

of the whole chapter pertaining to court stenographers, he is unmistakably referred to as an officer. He has been held to be such in many cases, as see State ex rel. Martin v. Wofford, 121 Mo. 61, 25 S. W. 851; State ex rel. Tilley v. Slover, 113 Mo. 202, 20 S. W. 788; State ex rel. Scales v. Zachritz, 145 Mo. 269, 46 S. W. 961. Referring to the office itself, the Kansas City Court of Appeals held, in State ex rel. Tilley v. Ford, 41 Mo. App. 122, l. c. 129, that he is an officer holding a legislative as distinguished from a constitutional office.

Primarily the obligation to pay the fees of the officers of the court may be said to rest on all litigants. By the ancient practice in England writs were "purchased," and at every step in the proceeding the party requiring services for which fees were to be paid, was required, at least supposed, to pay these fees to the officers for their services as fast as the services were rendered, even in advance of the services desired. [See Train v. Somerville, 22 Mo. App. 308, and cases there cited.] It is true that confessedly what is there said by Judge THOMPSON on this was *obiter*, but with his usual diligence that judge has collated many authorities, all fully sustaining him. The opinion in that case as to the payment of costs and fees was afterwards taken up by this court in State ex rel. Dale v. Ashbrook, 40 Mo. App. 64, a case in which that point was within the undoubted jurisdiction of this court, and the law as stated in the Train case followed.

By our law, however, and from a very early day, the expenses incurred in the prosecution of a cause are taxed as costs and recovered, ordinarily, by the prevailing party (section 2263), and collected either on fee bill or by execution, as the case may be. [Sections 2290 and 2292.] In certain cases they may be adjudged against the attorney (section 2291). Section 2258, Revised Statutes 1909, provides, briefly, that in all but some excepted cases, not necessary to notice any further than to say they do not cover the point before us

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as to court stenographers, the non-resident plaintiff or person for whose benefit the action is to be commenced, shall, before he institutes such action, file with the clerk an undertaking in writing, signed by a resident of this State, acknowledging himself bound to pay all costs which may accrue in such cause, it being further provided that if any such person commence his action without filing such undertaking or depositing with the clerk of the court a sum of money sufficient to pay all costs, the court on motion may dismiss the same, unless the undertaking is filed or money deposited before the motion is determined, and the attorney of the plaintiff shall be ruled to pay all costs accruing therein.

Section 2259, in substance provides that if after commencement of the action by a resident of the State, he becomes non-resident, or the court is satisfied that he is unable to pay costs, the court shall rule him to give security for costs, and if he fails to give security or deposit a sum of money sufficient to cover costs, the court may on motion dismiss the cause, unless proper security is given or deposit made before the motion is determined.

As part of the law concerning costs is section 2261, Revised Statutes 1909. That section, after providing that the court, if satisfied that plaintiff is a poor person and unable to prosecute his or her suit and pay the costs and expenses thereof, may in its discretion permit a party to commence and prosecute the action as a poor person, further provides, "and thereupon such poor person shall have all necessary process and proceedings as in other cases, without fees, tax or charge; and the court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such suit without fee or reward; but if judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court."

This is a venerable as well as humane provision of our law. Before the organization of our State government, while we were the Louisiana Territory, the Territorial Legislature, by an Act of November 7, 1808, recognized the right of a person to sue as a poor person. [See 1 Territorial Laws Missouri (Ed. 1842), chap. 68, p. 223.] One of the first laws passed after the admission of the State and the organization of the State government was an act approved January 11, 1822. [See 1 Territorial Laws Missouri, *supra*, p. 841.] The fourth section of this act is almost word for word what is now section 2261 of the revision of 1909. It appeared practically in that form in the revision of 1825 (see vol. 1, R. S. 1825, sec. 2, p. 226), and with slight amendments in the several revisions as it finally appears as section 2261, Revised Statutes 1909. This section of the statutes finds firm support, in fact is merely carrying out the provisions of our Bill of Rights (section 10, article 2, of the Constitution), which ordains that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay." That principle is older than any of our Constitutions, older even than Magna Charta. That but compelled the King to give formal recognition of a right that had always been claimed by those of the Anglo-Saxon race.

In section 11232, above referred to, it is provided that the court stenographer is to furnish the longhand transcript, "upon the payment to him of the fees" provided in the statute. If this was all the law in force relating to payment of costs and fees, relator would have no case. Statutes, however, are to be construed together; not piece by piece; not sentence or phrase by itself; but as a whole; and in construing them we are to have the whole body of the law in mind, harmonizing all its provisions, if possible, and also

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endeavor to arrive at the intent of the lawmakers. Let us test this provision by some examination of the public policy of the State, this latter determined, as often decided, by its laws.

Referring to what is now section 2261, it has been held that it covers actions by non-residents as well as by our own citizens. [See *Carrier v. Missouri Pac. Ry. Co.*, 175 Mo. 470, 74 S. W. 1002.] It will be noticed that no exceptions in favor of non-residents suing as poor persons are made in what is now section 2258. But Judge BURGESS observes that a like discretion is to be held as conferred upon the court by section 2261, in requiring security for costs from non-residents as in the case of residents and citizens of our State. It was there distinctly held that these two sections are to be construed together; that section 2258 is to be held as subject to the provisions of section 2261, and that the latter covered both classes, although non-residents are not named in section 2261.

The court stenographer, as we have seen, is an officer of the court. That he is as completely included in section 2261 as is any other officer, is clear. Nothing in that section exempts him in terms. Discussing the status of court stenographers under the provisions of what was section 8256, Revised Statutes 1889, now section 11263, R. S. 1909, Judge GANTT, in *State ex rel. v. Wofford*, before referred to, says, at page 73, after holding that the court stenographer is an officer of the court, that "he is not better than the other officers of the court. By section 4293 (now 2712, R. S. 1909), it is provided that 'When any appeal shall be taken or writ of error filed, which shall operate as a stay of proceedings, it shall be the duty of the clerk of the court in which the proceedings were had to make out a full transcript of the record in the cause, including the bill of exceptions, judgment and sentence, and certify and return the same to the office of the clerk of the Supreme Court without delay.' " This of course ap-

plies when a cause is taken up on a full transcript. Referring to State ex rel. Miller v. Daily, 45 Mo. 153, and to State v. Armstrong, 46 Mo. 588, the latter overruled in State v. Davidson, 73 Mo. 428, but not on this point, as holding this statute was imperative and personal to the clerk for the performance of the duty imposed upon him by law, Judge GANTR says (l. c. 74) : "Certainly it will be no greater burden on the stenographer to perform his duty than on the clerk, and the clerk cannot perform his duty until the stenographer transcribes the portion of the record that is in the notes. Attorneys are appointed to defend poor persons and give their services. Witnesses and jurors give their time and services for mere nominal fees often at great loss and inconvenience to themselves. The clerk of this court in the course of a year files a large number of transcripts for which he receives no docket fee." The same may be said with reference to the clerk of our court, it being specifically provided by section 10697, Revised Statutes 1909, that no docket or other fee shall be required in our court of persons permitted to sue as poor persons. It is also to be said that the court stenographer, being an officer of the court, is in the public service. He is paid for his time and his services in general out of public funds. It is further said by Judge GANTR in the above case (l. c. 73) that the legislation regarding court stenographers being in keeping with the spirit and humanity of the enlightened age in which we live and in harmony with the Constitution, emphasizes the rule of law and of the Constitution "that when a right exists all the means essential and necessary to the enforcement of that right are implied."

Counsel for the respondent claims that the express statutory provision requiring payment of the stenographer for furnishing a transcript in civil cases, having been enacted long after the statute allowing one to sue as a poor person, must prevail over the

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latter, and that the provision that transcripts of stenographers' notes in criminal causes are to be furnished gratis, is a legislative construction that the exemption applies solely to criminal causes, on the principle *expressio unius exclusio alterius est*. We do not agree to either proposition. The latter claim of counsel is answered by the fact that this "expression" is in an entirely different statute, and without any reference whatever to the statute governing civil causes. Nor does it follow that because a later act provides for payment for the transcribed notes before delivery, the earlier statute remitting payment of fees by those allowed to sue as poor persons, has been repealed by implication. Says Sedgwick, Construction of Statutes & Constitutional Law (2 Ed.), Pomeroy's Notes, top page 105, after having analyzed the authorities, "But though it is thus clearly settled that statutes may be repealed by implication, and without any express words, still the leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of Legislature together." [See also same work, top page 98, note (a).]

So our Supreme Court held in State ex rel. Maguire v. Draper, 47 Mo. 29, where at page 33, Judge Bliss says that while our Constitution is silent upon the question of implied repeals, and does not prohibit them, and "while repugnant statutes necessarily supplant previous ones, they must be clearly repugnant; for unless the legislative intent is expressed in terms, it will not be assumed if any other construction can be given to the subsequent act." This case is approved in State ex rel. Attorney-General v. Miller, 100 Mo. 439, l. c. 446, 13 S. W. 677.

It may be said of all the legislation concerning court stenographers, that it is, in a sense, special legislation and legislation to meet a new condition. But the provisions of our law, opening our courts to all, regardless of any pecuniary qualifications—to the poor

man as well as to the man of substance, is at the very foundation of the right of access to the courts, and is firmly set into the very foundation of our government, and extends over all legislation regulating the due administration of justice.

It is impossible, when we consider the long settled policy of our State with reference to opening our courts to those unable to pay, and placing the service of its officers at their disposal without fee or price, to believe that the legislative branch of our government intended to keep from them the services of the most important, in many respects, of all those officers, the court stenographer, when an appeal is to be taken.

Through all this period of change, from the Act of 1822 before referred to, indeed from the territorial law of 1808, our lawmakers have scrupulously endeavored to provide against the misfortune of poverty and to see to it that poverty was not only not a crime but should not, because of that, close the doors of our courts of justice to anyone seeking entrance.

The provisions in the law relating to court stenographers and providing that they are to furnish their transcribed notes on being paid for them, are no more mandatory than are the provisions of sections 2258 and 2259. It is obvious that if a person permitted to sue as a poor person through the trial court, the Supreme Court and this court, if unable to give security for costs or to pay the comparatively small fees that the sheriff and clerk and witnesses are allowed, as compared with the fees or costs for transcribing the records in a litigated case, is to be deprived of the work of the court stenographer, the result would commonly be an entire defeat of the right of appeal. Holding out the promise of admission to the courts of the land without price when one has not the price, without security when one is unable to furnish it, and then to deny to the suitor the benefit of the machinery provided by law for the preservation of the record of the

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proceedings in that court, would be to place our law-makers and courts among "those juggling fiends, no more believed, that palter with us in a double sense; that keep the word or promise to our ear and break it in our hope."

We are unable to accede to any view of the law which produces such a result as here contended for by respondent. We hold that it was within the power as well as the duty, of the honorable judge of the circuit court to order the stenographer of that court, acting in this cause, to furnish to the relator or her counsel the transcribed notes of the proceedings had at the trial of the case referred to in the petition for the writ.

It must also follow that the legal fees of the court stenographer are to be taxed in his favor for writing out and delivering his transcribed notes, as provided by section 2261, in the case of other officers. Out of abundant caution the court, in making the order on the stenographer herein required, should so state.

The alternative writ of mandamus heretofore issued in this cause is made absolute. *Nortoni* and *Allen, JJ.*, concur.

CASES DETERMINED
BY THE
ST. LOUIS, KANSAS CITY AND SPRINGFIELD
COURTS OF APPEALS

AT THE

MARCH TERM, 1913.

H. D. SILSBY, Appellant, v. NELLIE E. WICKER-SHAM et al., Respondents.

Springfield Court of Appeals, April 7, 1913.

1. **ADMINISTRATORS: Property Not of Estate: Administrator Taking Possession of: Owner May Replevin.** Where an administrator takes possession of property not belonging to an estate and holds the same as being property belonging to such estate, a suit in replevin will lie by the owner of such property against the administrator in his official capacity.
2. **_____: _____: Possession of and Sale by Administrator: Relief In Equity.** Where an administrator takes possession of property not belonging to an estate and sells the same as part of the estate and receives and uses the proceeds as part of said estate, a court of equity will afford relief to the owner by decreeing that payment be made for such property out of the funds of the estate.
3. **_____: _____: Administrator Taking Possession of and Selling: No Remedy Where Ownership and Possession Had Been Parted With.** But where one parts with both the ownership and the possession of goods, in either of the above-mentioned events, he cannot thereafter maintain replevin for goods thus in possession of the administrator, nor will equity afford him relief, the administrator having sold the goods as part of the estate.

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4. ———: **Exceeding Authority: Estate Not Bound.** A wife, as administratrix of the estate of her deceased husband, had no authority to bind the estate by purchasing and agreeing to pay for goods to be used in the continuation of the business which had been conducted by her husband before his death.

Appeal from Stone County Circuit Court.—*Hon. John T. Moore, Judge.*

AFFIRMED.

J. William Cook for appellant.

(1) As a general rule, all property which a deceased person owned at the time of his death is property subject to administration. 18 Cyc. 58. (2) Personal assets are not necessarily restricted to personality which deceased owned in his lifetime, but embraces also the proper and just earnings, incomes, accretions and accessions of and to those assets, even after the death of decedent. 18 Cyc. 174. (3) Therefore, the goods, wares and merchandise sold by appellant as described in the petition are not assets of the estate of James E. Wickersham, deceased. (4) Replevin would lie for the property mentioned in the petition, provided the defendant, John S. May, had possession of same. *White v. McFarland*, 138 Mo. App. 338. (5) Then why isn't this action to establish an equitable lien proper after said property has been converted into money. 25 Cyc. 667.

Rufe Scott and Charles L. Henson for respondent.

(1) Where the descendant by ample provisions of his will has authorized the continuation of his business, his executor is authorized to bind his assets with the burden of the new obligations incurred after his death, in continuing the business. *Schlickman v. Bank*,

129 S. W. (Ky.) 823, 29 L. R. A. (N. S.) 264; *In re Levi's Estate*, 73 Atl. (Penn.) 334; *Crook v. Humes's Exr.*, 109 S. W. (Ky.) 364; *Willis v. Sharp*, 21 N. E. (N. Y.) 705; *In re Moore*, 127 N. Y. Supp. 884; *Jewelry Co. v. Trust Co.*, 72 Mo. App. 514; *Bank v. Tracy*, 77 Mo. 594. (2) But, in the absence of express, positive, unequivocal and unambiguous provisions of a will authorizing it, executors and administrators are without any power to create a demand against the estate in their hands, based upon any contract or dealings arising after the death of the testator or intestate. *Yeakel v. Priest*, 61 Mo. App. 47; *Matson & May v. Pearson*, 121 Mo. App. 120; *Bank v. Tracy*, 77 Mo. 594; *Campbell v. Faxon*, 85 Pac. (Kan.) 760, 5 L. R. A. (N. S.) 1002; *Grace v. Seibert*, 85 N. E. (Ill.) 308; *In re McGovern*, 118 N. Y. Supp. 378; *Newspaper Union v. Thurmand*, 111 Pac. (Okla.) 204; *Summers v. Board of Com'rs*, 110 Pac. (N. M.) 509.

STURGIS, J.—Stranded on a demurrer in the trial court the plaintiff brings this case here by appeal. The sole question is whether or not the petition states facts sufficient to constitute a cause of action. As presented here the case is in effect against the estate of James E. Wickersham, deceased. The plaintiff alleges that he is and has been doing business as a wholesale hardware merchant; that said James E. Wickersham was engaged in like business at retail under the firm name, and was the sole owner, of the Crane Hardware Company; that he died in 1909, and his widow, Nellie E. Wickersham, was appointed administratrix of his estate; that she took possession of the stock of goods of the Crane Hardware Company and continued to operate said business and sell goods at retail; "that between the 18th day of October, 1909, and the 1st day of July, 1910, the said Nellie E. Wickersham, ordered, in the name of the Crane Hardware Company, for the Crane Hardware Company, certain goods, wares and

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merchandise valued at \$102.55, as is shown by the itemized statement hereto attached; that, relying on said orders being legally made, the plaintiff delivered to said Crane Hardware Company and Nellie E. Wickersham, the goods, wares and merchandise so ordered; that plaintiff made repeated demands upon the said Crane Hardware Company and Nellie E. Wickersham for payment therefor, which has been and now is refused."

The petition further states that said administratrix sold many articles belonging to said estate, inclusive of part of the articles described in said "Exhibit," and that she used the moneys so received therefor in paying the obligations of said estate; that, thereafter in 1910, her letters of administration were revoked and that John S. May, public administrator of Stone county, Missouri, succeeded her in that office; that said May, as administrator, sold the residue of said hardware stock, inclusive of the unsold portions of the goods described in plaintiff's exhibit, and received and has on hand the purchase price amounting to \$3200; that said May, as administrator, is about to make final settlement of said estate and does not intend to pay plaintiff for his goods, but does intend to distribute said estate to the creditors of the estate other than plaintiff, and the remainder, if any, to the heirs of James E. Wickersham. Plaintiff then states that he has no remedy at law to collect payment for his goods; and that unless aided by a court of equity, that he will never receive the money due him for his said property, which will work a hardship on plaintiff and leave him without any legal remedy. The relief prayed for is, "that this court shall adjudge to plaintiff a lien on the moneys in the possession of the said defendant, John S. May, in the sum of \$102.55 and for interest on same and for his costs; which said lien shall be on moneys belonging to the estate of James E. Wickersham, deceased; and that defendant, John S.

May, be restrained and enjoined from distributing all the moneys in his possession in this matter, but that said John S. May be ordered to retain so much thereof as it will take to satisfy plaintiff's claim and his costs."

It seems to us that this is a rather long call on a court of equity. The theory of plaintiff, as presented to this court, is that as replevin would lie for the property mentioned were it yet in the hands of the administrator, so the administrator, having converted said property to the benefit of the estate and the estate having profited thereby, ought to be compelled to refund the value of the property so converted out of the assets of the estate. There is no allegation in the petition as to the extent, if any, the proceeds of this property went to swell the funds of the estate. There is an allegation, however, that the proceeds of this property were used in part in paying the obligations of the estate, and that the balance was sold along with, and as part of, the effects of the deceased and the whole proceeds are in the hands of the administrator.

It will be conceded that where property, not belonging to an estate, is taken possession of and held in good faith by the administrator as being property belonging to such estate, a suit in replevin would lie by the owner of such property against the administrator in his official capacity. [White v. McFarland, 148 Mo. App. 338, 348, 128 S. W. 23.]

It would be fairly deducible from this and other authorities that where an administrator under such circumstances sells the property as part of the estate, but which does not in fact belong to the deceased or to his estate, and receives and uses the proceeds as part of said estate, a court of equity would afford relief to the owner by decreeing payment to be made for such property out of the funds of the estate. [Matson & May v. Pearson, 121 Mo. App. 120, 97 S. W. 983; Nichols v. Reyburn, 55 Mo. App. 1.]

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The difficulty with plaintiff's contention as applied to the facts of this case is that plaintiff was not the owner of the goods in question at the time the same were sold by defendant as administrator or by his predecessor in office. The facts alleged show that plaintiff intended to and did part with all ownership of the goods at the time the same were shipped and delivered by him to the Crane Hardware Company. The exhibit made part of the petition, shows that on plaintiff's books the goods were put down as "sold" to the Crane Hardware Company. It is not claimed that at the time of so selling and delivering said goods to the Crane Hardware Company, then in charge of Nellie E. Wickersham as administratrix, the plaintiff was ignorant of the fact that James E. Wickersham, the former owner, was dead; and that her possession and powers over said property was that of an administratrix only. There is no suggestion that she used any misrepresentation, fraud or concealment of the facts in order to get possession of such property, either for herself or for such estate. The allegations clearly show that plaintiff either sold the goods to Nellie E. Wickersham as an individual or to her as administratrix of her husband's estate. In either event plaintiff parted with both the possession and ownership of the goods, and could not thereafter maintain replevin as plaintiff contends. [Cooper Wagon Co. v. Wooldridge, 98 Mo. App. 648, 653, 73 S. W. 724; Westbay v. Milligan 89 Mo. App. 294; Bank v. Snyder, 85 Mo. App. 82, 86; Kennedy v. Dodson, 44 Mo. App. 550; Moore v. Carr, 65 Mo. App. 64, 69.]

Plaintiff practically concedes that Nellie E. Wickersham as administratrix had no authority to bind the estate of her deceased husband by purchasing and agreeing to pay for these goods. Such is clearly the law. [Yeakle v. Priest, 61 Mo. App. 47; Exchange Bank v. Tracy, 77 Mo. 594; Matson & May v. Pearson,

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121 Mo. App. 120, 97 S. W. 983; Campbell v. Faxton (Kas.), 5 L. R. A. (N. S.) 1002.]

It follows from this that plaintiff's petition does not state facts showing a valid claim against the estate of James E. Wickersham in the hands of his administrator, which can be enforced by a court of equity. The trial court did right in sustaining the demurrer and its judgment is affirmed.

All concur.

JOHN Q. JOHNSON, Administrator of the Estate of ARTHUR JOHNSON, Deceased, Appellant, v. DIXIE MINING & DEVELOPMENT COMPANY, Respondent.

Springfield Court of Appeals, April 7, 1913.

1. **DAMAGES: Damage Act: Statutes Construed: Compensatory Damages.** Secs. 5426 and 5427, R. S. 1909, are intended to give only compensatory damages and are in no sense penal. One suing under these sections must show the pecuniary loss and the damages must be pleaded and proven in order to recover.
2. **—: —: Suit by Administrator: Pleadings: Necessary Allegations.** An administrator brought suit under Secs. 5426 and 5427, R. S. 1909, to recover damages for the negligent death of his intestate, who at the time of his death was over the age of 21, and left no wife or minor children, natural born or adopted, surviving him. *Held*, that in order to maintain such action under said sections, it is necessary for the administrator to allege and show for whom he brought the suit in order to show wherein they were entitled to be compensated for the necessary injury, i. e., the pecuniary loss. [ROBERTSON, P. J., dissenting.]
3. **—: —: Petition: Demurrer to.** In an action by an administrator to recover damages for the negligent death of his intestate under Secs. 5426 and 5427, R. S. 1909, where the petition merely alleged that the plaintiff was the duly appointed administrator, set out the facts of negligence complained of, and the death of the deceased resulting therefrom, and alleged that the estate of the deceased had sustained injury, *held*, that a demurrer to the petition was properly sustained by the trial court. [ROBERTSON, P. J., dissenting.]

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Appeal from Jasper Circuit Court, Division Number One.—*Hon. Joseph D. Perkins, Judge.*

AFFIRMED. CERTIFIED TO SUPREME COURT.

Clay & Davis for appellant.

(1) The demurrer should have been overruled, because: First. The petition alleges that the deceased was, at the time of his death, above 21 years of age, that he left surviving him neither wife, minor child or minor children, natural born or adopted, the appointment of plaintiff as administrator, and that the deceased lost his life on account of certain specified acts of negligence of defendant. Second. Trial courts have no authority to order distribution of the amount recovered by administrators and executors in actions founded upon Sec. 5426, R. S. 1909, and it was, therefore, unnecessary for plaintiff to set out in his petition the names of the next of kin of the deceased. Railroad v. Then, 42 Ill. 791; United Breweries Co. v. O'Donnell, 77 N. E. (Ill.) 547; Howard v. Canal Co., 40 Fed. 195, 6 L. R. A. 75; Railroad v. Bradford, 6 So. (Ala.) 90; Warner v. Railroad, 94 N. Car. 250; Tel. Co. v. Simmons' Admr., 36 S. W. (Ky.) 171; Searl's Admr. v. Railroad, 9 S. E. (W. Va.) 248; Budd v. Railroad, 37 Atl. (Conn.) 683; Pilkin v. Railroad, 30 Atl. (Conn.) 772; James v. Railroad, 9 So. (Ala.) 335; Southern Pac. Co. v. Wilson, 85 Pac. 401. Third. The damages recoverable under Sec. 5426, R. S. 1909, are general damages, and it is not required of the pleader to plead facts showing how the husband, wife, minor child or minor children, the next of kin, or the estate of the deceased, as the case may be, are damaged. Ellings v. Railroad, 60 Mo. App. 679. Fourth. Sec. 5426, R. S. 1909, imposes an absolute liability upon the person or corporation causing the death of another by wrongful act, neglect or default, and the law presumes that the

husband, wife, minor child or minor children, the next of kin, or the estate of a person losing his or her life on account of the wrongful act, neglect or default of another, as the case may be, suffers damages; and plaintiff was, therefore, entitled to a judgment for nominal damages, at least, if he could have sustained the charges of negligence. *Railroad v. Brodie*, 40 N. E. (Ill.) 942; *Rhodes v. Railroad*, 81 N. E. (Ill.) 371, II Am. & Eng. Ann. Cases 3; *Howard v. Canal Co.*, 40 Fed. 195, 6 L. R. A. 75; *Railroad v. Weber*, 6 Pac. (Kan.) 877; *Fordyce v. McCants*, 4 L. R. A. (Ark.) 296; *Railroad v. Ryan*, 64 Pac. (Kan.) 603; *Anderson v. Railroad*, 52 N. W. (Neb.) 840; 4 Southerland on Damages (3 Ed.), sec. 1264; *Coal Co. v. Limb*, 28 Pac. (Kan.) 181. Fifth. The damages recoverable under Sec. 5426. R. S. 1909, in an action prosecuted by the executor or administrator, are for the benefit of the estate of the deceased, to be administered as other personal estate; and, in such an action, the measure of damages is what the deceased would have saved to his estate, if he had lived. *Electric Co. v. Bowder*, 45 So. 755, 15 L. R. A. (N. S.) 451; *Railroad v. Sullivan*, 120 Fed. 799, 57 C. C. A. 167; *Coal, Coke & Iron Co. v. Enslen*, 30 So. (Ala.) 603; *In re Meeking*, 164 N. Y. 145, 51 L. R. A. 235; *Railroad v. Spencer*, 51 L. R. A. (Col.) 121; *Southern Pac. Co. v. Wilson*, 85 Pac. (Ariz.) 401. (2) When the law presumes a fact, it should not be pleaded. Bliss on Code Pleading (2 Ed.), sec. 175. Facts which are implied or presumed to exist, from facts stated, need not be pleaded. *Duff v. Fire Association*, 129 Mo. 460; *McIntosh v. Rankin*, 134 Mo. 340. (3) It is generally presumed that a person dying left heirs capable of succeeding to his estate, unless the contrary appears. 14 Cyc. 99, d, and cases cited; 22 Am. & Eng. Ency. Law (2 Ed.), p. 1291, and cases cited; *Daudt v. Music*, 9 Mo. App. 169; *In re Taylor*, 20 N. Y. Supp. 960; *In re Clark*, 116 N. Y. Supp. 101. (4) The presumption that a person dying

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intestate has left heirs capable of succeeding to his estate can be repelled only by proof. Harvey v. Thornton, 14 Ill. 217, cited in 16 Cent. Dig., title Des. & Dis., sec. 233, col. 1609.

Spencer, Grayston & Spencer for respondent.

(1) The attempt to authorize an administrator to sue without providing the beneficiaries for such a suit coupled with the provision that the jury shall give damages with reference to the necessary injury to survivors who are entitled to sue may be void for uncertainty or by reason of the contradictory provisions which render the statute unenforceable as written. The courts are not authorized to rewrite statutes or to supply provisions to remedy the mistakes and omissions of the legislative department of our government. Bank v. Hale, 59 N. Y. 57 and 58; State ex rel. v. Ashbrook, 154 Mo. 393; Kehr v. Columbia, 136 Mo. App. 322. (2) There is no presumption of injury to one who is not specifically authorized to sue for the death of another. A petition is not sufficient which does not disclose facts showing how such plaintiff suffered loss by reason of the death. Regan, Admr. v. Railroad, 51 Wis. 599, 8 N. W. 292; Schwartz, Admr., v. Judd, 28 Minn. 371, 10 N. W. 208. (3) The injured survivor sues through the administrator as a trustee rather than as an administrator. Hegberg v. Railroad Co., 164 Mo. App. 514, 147 S. W. 192. (4) The use of the word "surviving" in section 5427 to qualify "parties who may be entitled to sue," is inconsistent with the idea that a cause of action is given to the general estate of the deceased. A recovery in behalf of the general estate of deceased would inure to the benefit of creditors. The word "survivor" would not include creditors. Koerts v. Grand Lodge, 119 Wis. 520, 97 N. W. 163. (5) An unbroken line of decisions in this State hold that secs. 5426 and 5427 contemplate only the recovery

of compensation. The statute authorizes the recovery of such "damages" as the jury "may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue." This means the pecuniary injury necessarily resulting from such death. McGowan v. Ore & Steele Co., 109 Mo. 518; Knight v. Co., 75 Mo. App. 541, and cases cited. (6) Where an infant sues for death of father, the loss of father's services as means of support during minority, is the correct measure of damages. McPherson v. Railroad, 97 Mo. 253; Goss v. Railroad, 50 Mo. App. 614; Sipple v. Co., 125 Mo. App. 81. (7) "Necessary injury" resulting to parent from negligent killing of minor child consists in loss of services of child during minority, with medical and funeral expenses. Rains v. Railroad, 71 Mo. 164; Calcaterra v. Iovaldi, 123 Mo. App. 347. (8) Loss of society is not an element of damage. Marshall v. Co., 119 Mo. App. 270, and cases cited; Leahy v. Davis, 121 Mo. 227. (9) Nor is plaintiff's mental anguish or distress for the death. Cases last above cited; Parsons v. Co., 94 Mo. 286; Goss v. Ry., 50 Mo. App. 614; Barth v. Ry., 142 Mo. 535; Knight v. Co., 75 Mo. App. at 550. (10) Nor is the physical pain of the deceased. McGowan v. Co., 109 Mo. 531. (11) Sec. 8523, R. S. 1909, provides that in case of death of injured "then damages for such injury or death may be recovered as provided by section 5425." This permits only a recovery for damages, by way of compensation, and not for a penalty. The reference only means that the parties therein designated may sue for and recover damages for such injury or death. In other words the act, by reference only, adopts the designation of the parties, who may sue. It does not adopt the penalty provision, and of course does not adopt the scheme of distribution of the money when recovered by an administrator. Nicholas v. Kelley, 159 Mo. App. 20. (12) The action is statutory and

the person suing must bring himself within the statutory requirements necessary to confer the right of action, and this must appear in the petition; otherwise, it will show no cause of action. *Barker v. Railroad*, 91 Mo. 86; *McIntosh v. Mo.*, 103 Mo. 131. (13) If in a suit by an administrator under section 5427, the recovery can only be by way of compensation for the pecuniary injury necessarily resulting from the death, then facts must be pleaded showing the existence of some person who sustained such injury and is entitled to be compensated therefor. The administrator, as such, does not occupy this position.

FARRINGTON, J.—This action was instituted in the circuit court of Jasper county by John Q. Johnson, the administrator of the estate of Arthur Johnson, deceased, for damages for the alleged negligent killing of the deceased while in defendant's employ. Deceased at the time of his death was over the age of twenty-one years, and left no wife, minor child or minor children, natural born or adopted, surviving him. The petition charges that deceased lost his life by reason of the negligent failure of the defendant to furnish him a reasonably safe place in which to do his work. The suit was brought under sections 5426 and 5427, Revised Statutes 1909. The defendant demurred to the petition for the reason that it failed to state facts sufficient to constitute a cause of action in that the administrator failed to allege the name or names of the beneficiaries for whom he sued and for a failure to allege a state of facts from which the measure of damages in an action brought under these sections could be ascertained. The petition merely alleged that plaintiff was the duly appointed administrator, set out the acts of negligence complained of and the death of the deceased resulting therefrom, and alleged that the estate of the deceased had sustained injury, and the prayer was as follows: “*Wherefore, plain-*

tiff says the estate of the deceased has been damaged in the sum of seven thousand dollars, for which judgment is prayed." The demurrer to the petition was sustained, and plaintiff electing to stand on his petition has appealed to this court, contending that an administrator suing under sections 5426 and 5427 does so for the benefit of the estate of the deceased and is not required to allege the names of the beneficiaries for whom he sues other than the estate and is not required to allege facts other than the acts of negligence and the death of the deceased nor to show the pecuniary loss for which defendant is called upon to answer in damages except such as would naturally occur to the estate of the deceased.

Whatever may have been the holdings under the damage act, which was originally passed in 1855 in this State, through its various amendments, and which is now embodied in sections 5425, 5426 and 5427, Revised Statutes 1909, the law is well settled at the present time that section 5425 is a remedio-penal statute; penal, so far as the defendant is concerned, to the extent of two thousand dollars, and any additional amount "in the discretion of the jury which may be sued for and recovered" in a case in which punitive or exemplary damages are alleged and proved; and remedial above that amount to the extent of ten thousand dollars. In other words, under section 5425 the defendant is required to pay as a penalty at least two thousand dollars, and, in the discretion of the jury, any greater sum according to the aggravating circumstances, and under this section the plaintiff will be permitted to allege, prove and recover any necessary pecuniary damage occasioned by the wrongful act of the defendant to the extent of the amount named in the statute. The widow of the deceased railroad engineer who died at his post of duty is compelled to sue under section 5425 and should not be confined to a recovery only of the penalty given by the statute, but in addition there-

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to should be allowed to recover and be compensated for the same necessary injury or pecuniary loss that the widow who sues under sections 5426 and 5427 is allowed.

The enabling provisions of the statute designating the parties and classes of parties to whom this penal and compensatory amount recovered shall go, are always held to be remedial. [Boyd v. Railroad, 236 Mo. 54, 139 S. W. 561.] The law as announced in the case just cited puts at rest many of the mooted questions under the statutes and addresses itself to the bench and bar of the State as being a sound and sensible solution.

Section 5426 has stood as it is now written since the Damage Act was first enacted in 1855, and section 5427 has been amended only to the extent of changing the amount which *may* be recovered and from time to time adding the classes entitled to sue as they have been added to section 5425. The amount recoverable under sections 5426 and 5427 has always been held to be compensatory damages, and if the two latter sections be read in connection with the whole act no other conclusion can be reached than that they are intended to give only compensatory damages. [See Proctor v. Railroad, 64 Mo. l. c. 119, 120; Schaub v. Railroad, 106 Mo. 74, 93, 16 S. W. 924; McGowan v. The St. Louis Ore & Steel Co., 109 Mo. 518, 531, 19 S. W. 199; Hegberg, Admr., v. Railroad, 164 Mo. App. 514, 551, 147 S. W. 192; Tetherow v. Railway Co., 98 Mo. 74, 86, 11 S. W. 310; Boyd v. Railroad, 236 Mo. 54, 88, 139 S. W. 561, and cases cited; Behen v. St. Louis T. Co., 186 Mo. 430, 447, 85 S. W. 346; Hartnett v. United Rys. Co., 162 Mo. App. 554, 558, 142 S. W. 750; Honea v. Railway Co., 245 Mo. Sup. 621, 151 S. W. 119, 125 and also page 127.]

The case of Hawkins v. Smith, 242 Mo. 688, 147 S. W. 1042, as well as a long line of decisions therein cited, holds that there is no new cause of action created

in the classes who may bring the suit, but that it is a transmitted right.

In 1905 when the Legislature added the administrator as the fourth class who could sue under section 5425, it failed to amend section 5427, and between 1905 and 1907 the maximum amount recoverable under sections 5426 and 5427 was five thousand dollars and could not be recovered by an administrator. [Crohn v. Telephone Co., 131 Mo. App. 313, 109 S. W. 1068.] Hence section 5427 was amended in 1907 by making the maximum amount ten thousand dollars and designating the parties and the manner as provided in section 5425.

By a strict construction of section 5427 an administrator in his suit, after having eliminated the various classes who could sue before his right would attach, would have no one as a beneficiary because, following, in the same provision, we have the clause, "to the surviving parties who may be entitled to sue," and as the only surviving parties who have been named that were entitled to sue were those named in the first, second, and third clauses, the administrator in order to exclude all classes ahead of him would exclude those for whom he would sue. However, for the purpose of deciding this case and giving the most liberal construction possible, as section 5427 refers by number to section 5425, and as section 5425 allows an administrator to recover for some one, to-wit, those who are entitled to the money according to the laws of descent, and as the enabling acts designating the parties to receive the money are remedial and ought therefore be given a liberal construction, we think the administrator under section 5427 would sue for the same parties as he would maintain his action for under section 5425, namely, where the deceased was an adult, for the father and mother, brothers and sisters, etc. In other words, that by referring to the class who receive under the laws of descents, the Legislature intended that the

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father and mother, brothers and sisters, etc., of a deceased adult would be the surviving parties who may be entitled to sue, and that he may maintain the suit for this fourth class under section 5427; and the Legislature meant under section 5427 that if there is a father and mother, brothers and sisters, or any of these, who have suffered a necessary injury—and by necessary injury is meant a pecuniary loss (see *Knight v. Lead & Zinc Co.*, 75 Mo. App. 541, 647, and cases cited)—then the plaintiff as administrator, acting in the capacity of a trustee for the class named, is entitled to bring the suit provided it can be shown that some one or all of this class is entitled to compensation for a pecuniary loss. The courts of this State have uniformly held that sections 5426 and 5427 are in no sense penal, but purely compensatory. For that reason the husband or wife suing under this section must show the pecuniary loss and the damages must be pleaded and proved in order to recover; so, also must the minor child or minor children show a pecuniary loss; and much more so must the father and mother of a minor child or the father and mother or brothers and sisters of an adult show this pecuniary loss because as to the last two classes the presumption of law which attaches to the husband or wife or to the minor children does not obtain. As section 5426 has never been amended, and is what is generally known as the Lord Campbell's Act of our statute, under which the recovery is damages for compensation only, the recent case of *Michigan Cent. R. Co. v. Vreeland*, 33 Sup. Ct. Rep. 192, 196, in discussing Lord Campbell's Act with reference to the pecuniary loss, is applicable here.

In the opinion of NORTONI, J., in the case of *Nicholas v. Kelley*, 159 Mo. App. 20, 139 S. W. 248, in discussing the bearing on section 8523, Revised Statutes 1909, of the amendment thereto, viz., "may be recovered as provided by section 5425," it was held that

it would not have the effect of changing section 8523 from a damage section to a penal section; so we hold that the amendment of 1907 by providing that the recovery shall be had by the same parties and in the same manner as in section 5425 would not change section 5427 to a penal section, but would leave it, as it has been from the date of its enactment, a section providing for the recovery of compensatory damages. Under this section it would be necessary, in order for the administrator to maintain an action, to show for whom he brought it and wherein they are entitled to be compensated for the necessary injury—pecuniary loss.

The reasons given by NIXON, P. J., in the case of *Hegberg v. Railroad*, 164 Mo. App. 514, 147 S. W. 192, in that part of the opinion covered on pages 553 to 559, meet with our entire approval. The opinion in that case is sufficiently clear in its holding that the administrator under our statute sues as the trustee of an express trust for the benefit of the distributees who are named in section 332 of the laws of descents and distribution. If it should be held that the administrator sues for the benefit of the estate, then the measure of damages accruing to the estate would probably be the amount the jury might find that he would have accumulated over and above his living expenses during the time of his expectancy and the recovery would be for such amount. The injustice such a construction would lead to can be readily seen by comparing the amount an administrator would receive with that which a minor child would receive for the death of his father. The minor child can recover only such pecuniary loss as he can show would be sustained from the time of the death of his father to his majority, while should the administrator recover for the estate and should the estate under the law of descents go to a brother or to a deceased brother's child, the brother, or nephew, as the case might be, would receive an amount as compensation not limited to

probably a few years as in the case of a minor child of the deceased, but probably to a long term of years, to-wit, to the end of the expectancy of the deceased. Again, the brother or nephew through the statute would recover all the net earnings of the deceased, whereas the minor child of the deceased could recover only that part of the earnings which he could reasonably expect to receive the benefit of. We cannot believe the Legislature intended to make so liberal a distribution in favor of the collateral kindred under the fourth clause of the statute, when under the other clauses the recipient of the fund is limited strictly to his necessary and pecuniary loss. Besides, if any force is given to the expression in section 5427—"to the surviving parties who may be entitled to sue"—neither an estate nor an administrator can be held to be a surviving party entitled to sue; and the most liberal construction that can be given to section 5427, carrying with it the fourth clause, is to hold that if there is any one or more within the class as designated in section 332, who have suffered necessary pecuniary injury and loss by reason of the wrongful death, then the administrator may maintain such action as a trustee for them, and in order to do so it seems imperative on him to designate the parties who have survived the deceased, and their relationship to the deceased, and facts showing the pecuniary loss they may have sustained for which the defendant must answer in compensatory damages.

The statutes and decisions of courts of other States cited by counsel have been examined, and while probably all the statutes are based on Lord Campbell's Act, there are none exactly like the Missouri statute—certainly none where the classes have been added and the amendments made as in this state. It is true, the Florida statute was held by a majority of the Supreme Court of that State to permit an adminis-

trator to sue for the benefit of the estate, but the statute provides for an injured party and not an injured surviving party, and the classes who must bring the suit if living in preference to the administrator of the deceased include not only those specifically named in *our* statute, but all dependents as well, and by exhausting all of the next of kin and all dependents, the court held that under their statute the administrator could sue for the benefit of the estate. There seems to be a vast difference between a case presented by an administrator under the Florida statute and one presented by an administrator under *our* own statute. To hold that the executor or administrator would recover for the benefit of the estate, which recovery he would take into the probate court and distribute under the orders of that court, seems to us to be in direct conflict with the wording of the statute. If this construction should be placed upon it, the next of kin would take subject to the costs of the probate proceedings and subject to the claims of creditors against the estate of the deceased. The statute expressly says that the amount recovered by the administrator shall be distributed according to the laws of descents—not according to the laws regulating the administration of the estates of deceased persons. The administrator or executor in this case is by the statute made the trustee of an express trust, as much so as an executor named in a will is a trustee of an express trust of a fund to be handled by him long after the administration of the will is closed in the probate court; and he is no more answerable for the management and distribution of the fund recovered under the statute to the probate court than an executor named as a trustee of an express trust in a will is answerable, so far as that trust is concerned, to the probate court.

The question as to the amount each of the beneficiaries would receive on a recovery is not before us, and as to how it would be divided we will not decide

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until such question is presented to us. It will be noted that as to the second class named in section 5425 there is a failure to provide how the money recovered shall be divided among the minor children, when necessarily, according to their respective ages, some would be entitled to receive more of the recovery than others, yet the courts have permitted judgments to stand without going into the question concerning the proper distribution of the fund between the children. In the case of McGowan v. The St. Louis Ore & Steel Co., 109 Mo. 518, 19 S. W. 199, a recovery of five thousand dollars was allowed to stand where the suit was brought for four minor children ranging in age from five to sixteen years.

For the reasons herein appearing, we think the action of the trial court in sustaining the demurrer was proper, and the judgment is therefore affirmed. *Sturgis, J.*, concurs. *Robertson, P. J.*, dissents.

SEPARATE CONCURRING OPINION.

STURGIS, J.—After much consideration, though contrary to my first impressions, I am constrained to concur in the essential features and the result reached in the opinion of FARRINGTON, J., in this case.

It seems to me that the whole question involved here turns on the narrower question of the measure of damages to be applied in cases originating under sections 5426 and 5427, Revised Statutes 1909, of the Damage Act as the same now stands.

At common law and in the absence of a statute the cause of action on the one hand and liability on the other growing out of personal injuries inflicted upon one person by the wrongful act or neglect of another died with the death of the injured party. The sole purpose of section 5426 is to keep alive and transmit, without saying in whom or to whom, the defendant's

liability to an action for damages growing out of the injury inflicted by such wrongful act or neglect, notwithstanding the same caused or resulted in the death of the injured party. This section of our statute has never been changed or amended since its enactment in 1855. Section 5427 provides for and designates the persons to whom and for whose benefit the liability is perpetrated and transmitted, and who may recover for the same, by reference to a previous section of the statute on the same subject; also the measure of damages (somewhat indefinite to be sure) and the maximum amount to be recovered in any such case. This section has never been amended, except as to the maximum amount and to keep that section in harmony with the section referred to as to the persons who could sue on the transmitted cause of action. It has never been changed or amended as to the measure of damages.

While the cases generally say, speaking from the standpoint of the beneficiary or plaintiff, that the cause of action is transmitted and kept alive (*Hennessy v. Brewing Co.*, 145 Mo. 104, 112, 46 S. W. 966; *Gray v. McDonald*, 104 Mo. 303, 311, 16 S. W. 398; *Strottman v. Railroad*, 211 Mo. 227, 255, 109 S. W. 769; *Hawkins v. Smith*, 242 Mo. 688, 147 S. W. 1042), the statute, section 5426, speaking from the standpoint of the wrongdoer or defendant, makes the *liability* continue notwithstanding the death of the person injured. It is, however, the bare liability that is preserved and transmitted—the mere right to sue. The elements of injury—the measure of damages—are not transmitted. [*McGowan v. Ore & Steel Co.*, 109 Mo. 518, 531, 19 S. W. 199; *Marshall v. Jack Mines Co.*, 119 Mo. App. 270, 95 S. W. 972; *Leahy v. Davis*, 121 Mo. 227, 25 S. W. 941; *Parsons v. Railway Co.*, 94 Mo. 286, 6 S. W. 464; *Barth v. Railway Co.*, 142 Mo. 535, 44 S. W. 778; *Knight v. Lead & Zinc Co.*, 75 Mo. App. 541, 550.]

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The measure of damages on the transmitted liability is prescribed by section 5427, and is: "such damages, not exceeding ten thousand dollars, as they (the jury) may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default."

In the absence of that degree of culpability on the part of defendant warranting punitive or exemplary damages, which is held to be included in and warranted by the last clause of the section, "having regard to the mitigating and aggravating circumstances, etc." (*Boyd v. Railroad*, 236 Mo. 54, 93, 139 S. W. 561), the damages to be recovered under this section has always been held to be compensatory only—the pecuniary injury necessarily resulting from such death. [*McGowan v. Ore & Steel Co.*, 109 Mo. 518, 19 S. W. 199; *Knight v. Lead & Zinc Co.*, 75 Mo. App. 541; and the long line of cases cited by FARRINGTON, J.]

The damages are not only limited to such as are pecuniary and necessarily resulting from the death but to such as result to the particular person or class of persons who survive and are authorized to sue. Such is the language of the statute. [*McPherson v. Railway*, 97 Mo. 253, 10 S. W. 846; *Sipple v. Gas-light Co.*, 125 Mo. App. 81, 102 S. W. 608; *Rains v. Railway*, 71 Mo. 164; *Calcaterra v. Iovaldi*, 123 Mo. App. 347, 100 S. W. 675.]

The difficulty in the construction of this statute arises from the fact that the Legislature first amended the preceding penal section 5425 by the addition of a fourth party (administrator or executor) who, in the absence of the particular designated parties who could sue in their own right, could maintain an action in a representative capacity for the benefit of whoever might take the fund recovered according to the statute

of descent. [Hegberg v. Railroad, 164 Mo. App. 514, 553, 147 S. W. 192.] The amendment, being primarily designed for section 5425, a penal section, fits nicely into the context of that section and makes a harmonious whole, but being loosely incorporated into section 5427 by mere reference to "the same parties and in the same manner as provided by section 5425," the language is a misfit and confusing. It is, however, hardly necessary to determine in this case whether the administrator or executor suing under section 5427 does so for the benefit of the same parties designated in section 5425, that is, those taking the fund recovered according to the statute of descent; but it seems plain that whoever such beneficiaries may be, this section of the statute and any action thereunder is compensatory only and the damages to be recovered are limited to the pecuniary loss resulting from the death to the persons for whose benefit the suit is being maintained.

It is rightfully held in Nichols v. Kelley, 159 Mo. App. 20, 139 S. W. 248, that the amendment of a purely compensatory section of the statute by a reference to the penal section for the persons who could sue did not change the nature of the action thereunder from one for compensation for loss suffered to one for a penalty. It is still a statute allowing *damages* only and not a penalty. That this section ought to be made penal like the preceding section, 5425, is a matter for the consideration of the legislative department of our State government.

It follows therefore that an action by an administrator under section 5427 is compensatory only and the amount to be recovered, as in Lord Campbell's Act on which it is founded, is measured by the necessary pecuniary loss to the persons for whose use and benefit the action is brought.

It would be competent for the Legislature to prescribe as a measure of damages, with reference to a

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suit by the administrator, the damage to the estate of the deceased, but that would be a new and different measure than that already prescribed by section 5427 prior to permitting an administrator to sue thereunder. This seems to have been done in other States. [Southern Pacific Co. v. Wilson, 85 Pac. (Ariz.) 401; In re Meekin, 64 N. Y. 145, 51 L. R. A. 235; McCabe v. Light Co., 61 Atl. (R. I.) 667.] To do so by construction would be judicial legislation. The Legislature did not do so and the measure of damages is left as it has always been. The mere authorization of an administrator to sue under this section does not work a change as to the measure of damages in such suits.

The defendant would have a right to controvert the alleged fact of the relationship to or dependency on the deceased and also the amount of loss necessarily sustained by the persons for whose benefit the suit is brought by the administrator; and a statement showing who these persons are, for whose benefit the suit is brought, is therefore essential in stating a cause of action under this section, at least where the plaintiff is suing for more than nominal damages.

DISSENTING OPINION.

ROBERTSON, P. J.—Plaintiff brought this action in the circuit court alleging that he is the duly appointed, qualified and acting administrator of the estate of Arthur Johnson, deceased, and that the said deceased was at the time of his death above the age of twenty-one years, and left no wife, minor child or minor children, natural born or adopted, surviving him; that the defendant was at all of the times mentioned in the petition a Missouri corporation engaged in mining in Jasper county, Missouri, and that by reason of the negligence of the defendant as therein alleged the said Arthur Johnson received injuries of

which he died, and prayed judgment for the sum of \$7000.

To this petition the defendant filed its general demurrer and alleged as ground therefor that the petition did not state facts sufficient to constitute a cause of action against the defendant. The demurrer was sustained and plaintiff refused to plead further, whereupon the court rendered judgment in favor of the defendant.

Plaintiff perfected his appeal to this court and it is necessary to construe section 5427, Revised Statutes 1909, with reference to the question as to whether or not a cause of action vests in an administrator thereunder, and if so, then the essentials of the petition based on this section.

As the demurrer is general I shall undertake to confine my consideration of the petition to the objections relied upon by the respondent here as disclosed by the brief filed in its behalf, which are as follows:

“1. The attempt to authorize an administrator to sue without providing the beneficiaries for such a suit coupled with the provision that the jury shall give damages with reference to the necessary injury to survivors who are entitled to sue may be void for uncertainty or by reason of the contradictory provisions which render the statute unenforceable as written.

“2. There is no presumption of injury to one who is not specifically authorized to sue for the death of another. A petition is not sufficient which does not disclose facts showing how such plaintiff suffered loss by reason of the death.

“The injured survivor sues through the administrator as a trustee rather than as an administrator.

“The use of the word ‘surviving’ in section 5427 to qualify ‘parties who may be entitled to sue’ is inconsistent with the idea that a cause of action is given to the general estate of the deceased.

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"A recovery in behalf of the general estate of deceased would inure to the benefit of creditors. The word 'survivor' would not include creditors."

At common law "the death of a human being could not be complained of as an injury." This condition brought forth the adoption in England in 1846 of what is commonly known as "Lord Campbell's Act," under the title of "An act for compensating the families of persons killed by accident." It provided that the action should be brought in the name of the executor or administrator of the deceased and for the wife, husband, parent and child of the deceased, the jury to find and direct the distribution of the recovery. In 1864 there was an amendment of this act authorizing the beneficiaries to bring the action when there was no executor or administrator to sue. It appears that the holding has been under that act that a new cause of action is created, and otherwise it is materially different from our Damage Act.

It has often been stated by the courts of this country that Lord Campbell's Act is the initiative of this class of legislation and the suggestion for all subsequent acts of a similar nature, but however that may be the sections of the Missouri statute, out of which the present sections 5425, 5426 and 5427 evolved, were first adopted in 1855 under the title of "An act for the better security of life, property and character," being sections 2, 3 and 4 (R. S. 1855, pp. 647, 648, 649). Sections 5426 and 5427 are in the exact language of sections 3 and 4 of the original act, except that in section 5427 (originally section 4) the reference to the preceding sections has been changed to conform to the present section numbers, and the amount of recovery allowed has been enlarged from \$5000 to \$10,000.

Section 2, now section 5425, when first enacted allowed recovery as follows:

"First, by the husband or wife of the deceased; or, Second, if there be no husband or wife, or he or

she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor."

In 1885 (Session Laws 1885, pp. 154, 155) the Legislature amended the second section so as to include legally adopted children. In 1905 (Session Laws 1905, pp. 135, 136, 137) the second section of the act (Section 5425) was amended by adding thereto the fourth subdivision, giving the right of recovery to the administrator or executor of the deceased when the individuals named in the first three subdivisions do not exist, and providing that "the amount recovered shall be distributed according to the laws of descent." No change was made at that time in the fourth section of the act, now section 5427, and it was thereafter held, in the case of *Crohn v. Kansas City Home Telephone Co.*, 131 Mo. App. 313, 109 S. W. 1068, that as it referred to the old section as it read before the amendment of 1905 no suit could be maintained thereunder by the administrator. The Legislature in 1907 re-enacted the fourth section with appropriate reference to the second section, thereby connecting them as they now stand.

That an action based on these provisions of our statute is not a new cause but a transmitted one appears to be settled in this State. [*Proctor v. Hannibal & St. Joe R. R. Co.*, 64 Mo. 112, 121; *White v. Maxcy*, 64 Mo. 552, 558; *Gray v. McDonald*, 104 Mo. 303, 311, 16 S. W. 398; *Hennessy v. Bavarian Brewing Co.*, 145 Mo. 104, 112, 46 S. W. 966; *Strottman v. Railroad*, 211 Mo. 227, 255, 109 S. W. 769.]

It will be observed that section 5427 provides that the damages accruing under section 5426 "shall be sued for and recovered by the same parties and in the same manner as provided in section 5425" and that

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the damages shall be ascertained "with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue," so that it becomes necessary to consider section 5425 with reference to who are the surviving parties designated therein as being entitled to maintain the suit. It will be seen that there are four classes, three of which are the immediate dependent relatives of the deceased and the fourth is the administrator or executor in the event of the absence of the three previously mentioned classes. Looking at the sections from this position the question first arises as to whether or not an administrator or an executor is a "surviving party" within the meaning of that term as used in section 5427, and in this connection it is observed that the expression "to the surviving parties" is not unqualified nor to be taken in the ordinary and usually accepted application of that expression but it is modified by the words "who may be entitled to sue." Thus demonstrating, I think, that when administrators and executors were designated as parties who were entitled to sue that then they were within the meaning of section 5427 "surviving parties" as they are, under section 5425, entitled to sue.

If statutes can be consistently reconciled such construction must be adhered to as will give vitality to every portion thereof and such as will not destroy the legislative intent. It must be remembered that after section 5425 had been amended so as to authorize administrators and executors to sue under certain contingencies, and after the Kansas City Court of Appeals had held that the provisions of that section in that respect did not thereby come within the provisions of section 5427, it was amended by the Legislature, as above pointed out, with the evident intent and purpose of extending the right theretofore transmitted to certain parties to the executors and administrators if the parties mentioned in the first three pro-

visions of section 5425 did not exist. This construction gives section 5427 a meaning which, in the case now before us, would be equivalent to saying that the administrator or executor, as the representative of the estate of the deceased and the person to whom is transmitted the cause of action deceased would have had if he had survived, should be given such damage, not exceeding \$10,000, as the jury might deem fair and just with reference to the necessary injury resulting from such death to the administrator or executor as such representative. The administrator or executor is the legal representative of the estate of the deceased and the damages are not allowed to him personally but to him officially as such administrator or executor. The suit is authorized to be brought by him in his official capacity as a representative of the estate and the damages accrue to him by reason of the statute and the position he holds. The laws governing the administration of estates make it his right and duty to reduce to his possession the personal property and assets of the decedent's estate, including in this instance the value of the right of action transmitted to him by virtue of the statute. [Jacksonville El. Co. v. Bowden, 15 L. R. A. (N. S.) 450, 45 So. (Fla.) 755.]

In construing the effect of the amendment which added the word "administrator" to the Damage Act, I think it is important not to overlook the fact that the first three subdivisions of the second section entirely exhaust the legal dependent classes and I think the Legislature intended exactly what it said, in view of the construction of the Supreme Court of this State that the cause of action theretofore created was a transmitted cause, that the cause of action which might have been maintained by the deceased in the event he had lived should be transmitted to the administrator of his estate, and that the administrator should recover damages, as stated in the case of Illinois Central Railroad Co. v. Barron, 72 U. S. 106, taking into con-

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sideration all of the circumstances attending the death, the relations between the deceased and his next of kin, the amount of his property, the character of his business and the prospect of increase of wealth likely to accrue to a man of his age with the business and means which he had, and also that there was a probability and the chance of business that the deceased's estate might have decreased rather than have increased, and that consideration should be given to the possibility and also the probability that the deceased might marry and his property descend into another channel.

The majority opinion in this case, in my judgment, partially recognizes the theory for which I contend in the construction of this statute and partially repudiates it. Their opinion holds, as I understand it, that the administrator sues in the nature of a trustee of an express trust, representing certain descendants of the deceased, and limiting, in my opinion, the intent and purpose of the statute, and reading therein that the administrator does not represent the estate of the deceased, as is provided for and contemplated under the general administration act, and segregates and eliminates certain kin of the deceased who, with those they include, have no legal claim directly against the deceased had he survived. The first three subdivisions exhaust the entire class of relatives who have any direct legal claim on a deceased and all others can legally derive a pecuniary benefit from the life of the party, during his life, by reason of some voluntary act on his part, and after his death such parties can establish no legal claim on account of an action transmitted except by virtue of the laws of descent and distribution worked out under the laws of administration.

In the first three subdivisions of section 5425 certain persons are designated who may bring the suit in their own behalf, but when we consider the fourth subdivision we find that the right of action, when the three previous classes are eliminated, vests in the

administrator or executor; and, since under the statute the administrator and executor can only represent the estate of the deceased, that being their sole duty under the administration laws, I think it would result practically in a judicial repeal of the fourth subdivision of that section to construe it as meaning that the action cannot be maintained for the benefit of the estate. The majority opinions hold that under certain possible contingencies a cause of action may be vested in an administrator for the benefit of individuals not named in the second section.

Entertaining the views as above expressed it necessarily follows that I am of the opinion that it is not essential in a cause of action of the character involved here, any more than it is necessary in any action by an administrator for the benefit of the estate, to allege the names of the beneficiaries. I think the petition in this case states a cause of action and that the judgment of the circuit court should be reversed and the cause remanded with directions to set aside its judgment and to overrule the defendant's demurrer.

In my opinion the case of *Murphy v. Railroad*, 228 Mo. 56, 87, 128 S. W. 481, concedes the construction of this section of our statute to the effect that the cause of action survives to the administrator as the representative of the estate of the deceased under the conditions existing in this case, because the opinion in that case, although an action under the second section of our Damage Act, discusses the question as to whether or not the said section is entirely penal or partially penal and partially compensatory, and Judge LAMM assumes, I think, that the second section contemplates an element of compensation which is transmitted to the administrator, wherein he states that, "Then the jury had the facts before them from which they could reasonably infer the worth of the man as a citizen," which is contrary to the theory on which the majority opinions proceed in the case at bar. The *Murphy* case was

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an action by an administrator and, while it is true in that case the deceased left an adult son surviving, there was no notice taken of that fact and the court in approving the above statement necessarily presupposed that the cause of action vested in the administrator as such and not by reason or by virtue of the survival of any designated relative, and with this also the majority opinion is in conflict.

In the case of Boyd v. Railroad, 236 Mo. 54, 139 S. W. 561, it is said in construing the second section of the Damage Act relative to the introduction of testimony concerning the probable pecuniary loss involved that, "if the victim left no wife, husband or child, the jury, within the limits of that discretion, ought to be permitted to consider the fact that the amount recovered will go to collateral kindred of the deceased who had no claim upon his bounty or support." In that case the Supreme Court was considering the question of pecuniary loss and I take it that the statement of that court is directly in point in this case and is ignored by the opinions of the majority, because it wholly explodes the theory of the majority opinions in this case that the amount which may be recovered is confined exclusively to others than collateral kindred.

I deem the opinions of the majority in this case contrary to the decisions of the Supreme Court in the Murphy and Boyd cases, supra, and request that this case be certified to the Supreme Court.

EARL E. RHEA, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Springfield Court of Appeals, April 7, 1913.

1. **MASTER AND SERVANT: Personal Injuries: Instruction: Refusal: Harmless Error.** In an action for damages by a railroad fireman against a railroad company on account of personal injuries, *although* a requested instruction which defined the duty of the master to the servant in the furnishing and handling of appliances was proper and might well have been given by the trial court, *yet* its refusal did not constitute reversible error, where the instructions which were given clearly instructed the jury concerning the duty of the defendant to exercise ordinary care and diligence in furnishing the appliance, and instructed that, if they should find that the plaintiff was guilty of contributory negligence, they should find for the defendant.
2. **—: Instructions: Refusal of Adversary's Instruction: Cannot Complain of.** A party cannot except to the action of the trial court in refusing instructions which the adverse party has requested.
3. **—: Liability of Master Defective Appliances: Evidence Reviewed.** In an action by a railroad fireman against a railway company for personal injuries, which were occasioned by the giving way of a grab iron on account of the loss of a set screw therewith connected, when the fireman was attempting to alight from the engine, the evidence is examined and reviewed and *held* sufficient to warrant the jury in finding that the grab iron became defective on account of the set screw being out, and that it was out and defective for such a length of time as to impute knowledge to the defendant.
4. **—: —: Negligence: Proof of: Proper Inferences.** Proof of negligence is not conjectural where established by facts from which a logical inference may be drawn that the defects caused the accident.
5. **—: Appliances Furnished: Master's Duty Concerning: Servant's Right of Reliance.** An ever present and continuing duty rests upon the master to use ordinary care to furnish reasonably safe appliances. He must keep the appliances in repair so far it can be done by the exercise of ordinary care, diligence and inspection. In the absence of knowledge of a defect in the appliances being brought home to the servant, he has a right to rely upon the master faithfully performing that duty.

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6. _____: Personal Injury: Negligence: Question for Jury. In an action by a railroad fireman against the railroad company for injuries which were occasioned by the giving way of a grab iron due to the loss of a set screw, on an engine from which plaintiff was alighting, it was a question for the determination of the jury whether the defendant company exercised such reasonable care and inspection as to have discerned the fact that the screw was missing or that it was loose. And the finding of the jury, under proper instructions, should not be disturbed by the appellate court.
7. _____: Injury to Servant: Two Possible Causes: Rule of Law. Where in the case stated, it is uncontested that the cause of the fall which occasioned the injury to plaintiff was the giving way of the grab iron, in the absence of contributory negligence, no application can be made of the rule that where the injury may have resulted from one of two causes, for one of which and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result; and if the evidence leaves it to conjecture, the plaintiff must fail in his action.
8. _____: _____: Contributory Negligence: What Is. Where the servant of his own free will chooses an unsafe manner of doing his work or using the master's appliances, when other and safe ways are at hand, he will not be permitted to recover for an injury, provided the way he has chosen is so dangerous that an ordinarily prudent person would not have selected it.
9. _____: _____: _____: What Is Not. It is not contributory negligence on the part of the servant to follow a custom habitually followed by his fellow-servants, to the knowledge of the master, unless the danger is so obvious that an ordinarily prudent person would refuse to take the risk arising from such method of work.
10. **MASTER AND SERVANT: Contributory Negligence: Question for the Jury.** Contributory negligence as a matter of law cannot be charged to a railroad fireman who was injured in attempting to alight from an engine going at the rate of six miles an hour, when he thought the safety appliances were in proper condition and where the place at which he alighted was a safe one. It is a question about which reasonable minds might differ as to the hazards connected with the act and should be submitted to the jury under proper instructions.
11. _____: _____: Degree of Care Required of Servant. In the use of appliances furnished by the master, the servant is
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held only to that degree of care which an ordinarily prudent man would exercise under the same or similar circumstances.

12. ———: **Scope of Employment: Includes What.** *Although* a fireman, whose duty it was to go to the roundhouse and prepare his engine for his trip, was not in control of the engine while riding from the roundhouse to the station, and *although* his act in swinging from the engine for the purpose of going to a nearby lunch room to get a cup of coffee before making his trip, cannot be said to be such an act as was necessary to be done for the defendant company, *yet* he was on the engine in the course of his employment and the attempt to alight was not unusual, unwarranted, unlawful or unnecessary. *Held*, that he was within the line of his employment from the time he went to the roundhouse until he fell, in attempting to alight from the engine, and was injured.

Appeal from Barton County Circuit Court.—*Hon. B. G. Thurman, Judge.*

AFFIRMED.

R. T. Railey, Scott & Bowker, H. W. Timmonds
for appellant.

(1) The presumption is that the employer has discharged his duty in providing suitable appliances for his work and in keeping them in that condition. *Glasscock v. Dry Goods Co.*, 106 Mo. App. 663-4. (2) In the absence of affirmative proof of negligence the simple fact of an injury occurring is to be rather attributable presumptively to misadventure, inevitable fate or other causes for which the employer is not liable. *Glasscock v. Dry Goods Co.*, *supra*; *Nolan v. Shickle*, 3 Mo. App. 304-5; 69 Mo. 336. (3) It devolves upon the employees as a condition precedent to his right to recover that he affirmatively prove the nonfulfillment or nonperformance of some duty or obligation owing him by his employer. *Glasscock v. Dry Goods Co.*, 106 Mo. App. 663; *Gurley v. Railroad*, 104 Mo. 223; *Yarnell v. Railroad*, 113 Mo. 570; *Dowell v. Guthrie*, 116 Mo 646. (4) It must be shown not only that there was a defect in the place or appliance which caused the in-

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jury, but that it was known, or could have been known to the master, had he exercised ordinary care, and in the absence of proof of either of the essentials there can be no recovery. *Glasscock v. Dry Goods Co.*, 106 Mo. App. 663-4; *Franklin v. Railroad*. 97 Mo. App. 482; *Rowden v. Daniel*, 151 Mo. App. 25, 26, 27. (5) Machinery and utensils will get out of repair from use; and now and then a mishap will occur from their being out of repair, before the fact is known or could be known by careful management. It is a just rule for the protection of employers that they are not responsible for a mishap thus caused. They must have known, or have had the opportunity to know, of the defect and have had, too, a chance to mend it, for liability to attach. *Oker v. Construction Co.*, 158 Mo. App. 223-4; *Bailey v. Dry Goods Co.*, 149 Mo. App. 661; *Pavey v. Railroad*, 85 Mo. App. 222-3; *Kelley v. Railroad*, 105 Mo. App. 376; *Howard v. Railroad*, 173 Mo. 531. (6) That it is not for the defendant to account for the accident on a theory consistent with due care, but for the plaintiff to account for it on a theory inconsistent therewith, all the cases concede. That such theory must not rest upon bare conjecture, but must rest either upon direct proof, or upon proof of facts establishing a direct and immediate connection between the defects and accident complained of by logical inference, is equally conceded. *Breen v. Cooperage Co.*, 50 Mo. App. 214. (7) If the injury may have resulted from one of two causes, for one of which, and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture, the plaintiff must fail in his action. *Warner v. Railroad*, 178 Mo. 134; *Goransson v. Manufacturing Co.*, 186 Mo. 307. (8) Where a person having a choice of two ways, one of which is perfectly safe and the other of which is subject to risks and dangers, voluntarily chooses the lat-

ter and is injured, he is guilty of contributory negligence and cannot recover. *Hurst v. Railroad*, 163 Mo. 319; *Hirsch v. Bread Co.*, 150 Mo. App. 174. (9) An employee cannot recover damages of his employer received in consequence of the violation by the employee of a reasonable regulation intended to promote his safety. *Zumwalt v. Railroad*, 35 Mo. App. 661; *Renfro v. Railroad*, 86 Mo. 302; *Francis v. Railroad*, 110 Mo. 387; *Johnson v. Railroad*, 147 S. W. 529; *Matthews v. Railroad*, 227 Mo. 250. (10) If an employee voluntarily leaves the work assigned him and engages in other work for his employer and is injured thereat he cannot hold his employer liable. *Duval v. Packing Co.*, 119 Mo. App. 150. (11) This court has no jurisdiction of this cause for the constitutionality of a statute of Missouri is involved. Sec. 12, art. 6, Constitution of Missouri, 1875. (12) A constitutional question may obtrude itself on the notice of the court and be considered *sua sponte*. *Cable v. Duke*, 208 Mo. 558; *City of Tarkio v. Clark*, 186 Mo. 294. (13) Questions of jurisdiction as to the subject matter may be raised at any stage of the case, in any court, by either court or counsel. *Lohmeyer v. Cordage Co.*, 214 Mo. 685. (14) Sec. 3172, R. S. 1909, is unconstitutional and void because the original act containing said section was not passed in accordance with the provisions of the Constitution. Sec. 28, Art. 6, Constitution of Missouri 1875; *City of St. Louis v. Weitzel*, 130 Mo. 600; *The State v. Coffee & Tea Co.*, 171 Mo. 634; *State v. Fulks*, 207 Mo. 26. (15) Where the act of the Legislature is broader than its title, the act is void. *Cooley's Constitutional Limitations* (7 Ed.), 202-211.

Stivers & Morris and W. W. Calvin and Edwin L Moore for respondent.

(1) It was unquestionably the continuing duty of the defendant, appellant, to exercise reasonable or or-

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dinary care, with respect to the inspection of its engine, in order that defects patent or latent might be discovered; and, it was therefore chargeable with the knowledge of the existence of such defects therein or thereon as could, by the exercise of such degree of care, have been ascertained. *Jones v. Railroad*, 20 R. I. 210, 37 Atl. 1033; *Railroad v. Snyder*, 152 U. S. 684, 38 L. Ed. 591; *Railroad v. Mulligan*, 67 Fed. 569; *Railroad v. Pearcy*, 128 Ind. 197, 27 N. E. 479; *Railroad v. Utz*, 133 Ind. 265, 32 N. E. 881; *Railroad v. Howell*, 147 Ind. 266, 45 N. E. 584; *Iron Co. v. Dillon*, 201 Ill. 145, 69 N. E. 12; *Bridge Co. v. Olson*, 54 L. R. A. 33; *Budge v. Railroad*, 180 La. 349, 58 L. R. A. 333; *Louis v. Railroad*, 59 Mo. 495, 504; *Condon v. Railroad*, 78 Mo. 567; *Parsons v. Railroad*, 94 Mo. 286; *Guttridge v. Railroad*, 105 Mo. 520; *O'Mellia v. Railroad*, 115 Mo. 205; *Coontz v. Railroad*, 121 Mo. 653; *Wood v. Railroad*, 181 Mo. 445; *Scheurer v. Rubber Co.*, 227 Mo. 368; *Clowers v. Railroad*, 21 Mo. App. 217; *Thompson v. Railroad*, 86 Mo. App. 141; *Zellers v. Water & Light Co.*, 92 Mo. App. 117; *Hach v. Railroad*, 117 Mo. App. 11; *Ogan v. Railroad*, 142 Mo. App. 248, l. c. 252; *O'Flanagan v. Railroad*, 145 Mo. App. 280; *Blake v. Railroad*, 159 Mo. App. 405, 141 S. W. 24; *Johnson v. Railroad*, 160 Mo. App. 69; *Johnson v. Railroad*, 164 Mo. App. 617, 26 Cyc. 1097; 4 Thompson's Com. on Negligence, secs. 3947-3948-3949; Dec. Digest (Master and Servant), secs. 101-102-124-286; Cen. Digest (Master & Servant), secs. 180-184-235-242. (2) From the facts and circumstances, as disclosed by the testimony, it became and was a proper question for the jury to determine whether or not defendant, appellant, could, by the exercise of such care, have discovered the defect causing the injury, in time to have enabled it, by the exercise of such care, to remedy or repair the same before the happening thereof; and therefore the court committed no error in overruling the demurrer to the evidence. Cases supra; Hollen-

beck v. Railroad, 141 Mo. 97; Young v. Oil Co., 185 Mo. 634; Walker v. Railroad, 193 Mo. 482; Deschner v. Railroad 200 Mo. 327; Brady v. Railroad, 206 Mo. 509; George v. Railroad, 225 Mo. 364; Eikenberry v. Transit Co., 103 Mo. App. 442; Bond v. Railroad, 110 Mo. App. 131; Brannock v. Railroad, 47 Mo. App. 301; Monroe v. Railway, 155 Mo. 710; Yost v. Railway, 149 S. W. 577; 26 Cyc. 1102; 4 Thompson's Com. on Negligence, secs. 3951-3952. (3) But the bare showing that plaintiff's, respondent's, injury was directly due to the defective and unsafe condition of the handhold or grabiron which he was at said time attempting to use, in the usual and ordinary manner, would, of itself, have been sufficient to warrant and sustain his recovery herein; and even under that bare showing the defendant, appellant, could have been denied the right of interposing either contributory negligence or assumption of risk as a defense. Accordingly, therefore, the instructions as given by the court were too favorable to the defendant in this: that the jury were required to find that plaintiff was not guilty of contributory negligence, whereas, under certain provisions of the Revised Statutes of Missouri, 1909, applicable here, the plaintiff was entitled to recover even though he had been guilty of contributory negligence, and even though he had known that the handhold or grabiron was defective. Secs. 3166-3172, R. S. 1909. (4) But, moreover, the testimony affirmatively disclosed: (a) That plaintiff, respondent, was rightfully upon his engine and in the course of his employment; (b) that his purpose in attempting to alight therefrom was not unusual, unwarranted, unlawful, or unnecessary, but was within the course of his employment; (c) that to attempt so to do, at said time and place, was not dangerous and unsafe, and that he was not, therefore, guilty of contributory negligence as a matter of law; (d) that the defective and unsafe condition of the handhold or grabiron was the proximate cause of his

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injury; (e) that he did not know of the defective and unsafe condition of the handhold or grabiron before he attempted to use the same, but was not on that account guilty of contributory negligence as a matter of law; (f) that a proper and timely inspection by the defendant, appellant, of the engine in question would have disclosed the defective and unsafe condition of the handhold or grabiron; (g) and that thereafter the defendant, appellant, could, by the further exercise of reasonable or ordinary care, have remedied or repaired such condition prior to the happening of the injury. So, therefore, the action of the trial court in overruling defendant's, appellant's, demurrer was fully warranted; and its complaint and contention thereupon, as here made, are without merit. Cases supra cited under points 1 and 2. (5) Appellant's contention that respondent, at the instant he sustained the injury complained of, was not acting within the line of his employment is in all respects untenable, as it is of no consequence, under sec. 3172, R. S. 1909, whether or not he was, at that particular instant, actually engaged in the performance of some task for the benefit of the master. Sec. 3172, R. S. 1909. (6) But counsel for respondent earnestly contend that respondent, in alighting from his engine for the purpose as shown by the testimony, was acting within the line or scope of his employment; and appellant's contention that he was not so acting is neither sanctioned by text-writers nor sustained by judicial decision; neither is there any logic in such contention, regardless of the absence of judicial authority, and the same should be characterized as frivolous. *Sugar Co. v. Riley*, 50 Kan. 401, 31 Pac. 1090; *Broderick v. Depot Co.*, 56 Mich. 261, 56 Am. Rep. 382, 22 N. W. 802; *Hilmke v. Thilmany*, 106 Wis. 216, 83 N. W. 360; *Railroad v. Maddox*, 134 Ind. 571, 33 N. E. 335; *Railroad v. Martin*, 13 Ind. App. 485, 41 N. E. 1051; *Boyle v. Columbian, etc. Co.* 182 Mass. 93, 64 N. E. 726; *Powers v. Sugar Co.*, 48 La.

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Ann. 483, 19 So. 455; Moore v. Lumber Co., 105 La. 504, 29 So. 990; Mill Co. v. Rockholt, 133 Ala. 115; 42 So. 96; Iron Co. v. Curl, 64 So. (Ind. Terr. 1907) 969; Johnson v. Railroad, 122 N. C. 955, 29 S. E., 784; Railroad v. Chaney, 102 Ga. 814, 33 S. E. 437; Davis v. Railroad, 66 S. C. 340, 41 S. E. 468; Railroad v. Welsh, 72 Tex. 298, 2 L. R. A. 839, 10 S. W. 529; Railroad v. Turner, 99 Tex. 547, 91 S. W. 562; McNulty v. Railroad, 192 Pa. 497, 46 L. R. A. 730; Olson v. Railroad, 76 Minn. 149, 48 L. R. A. 796; O'Donald v. Railroad, 59 Pa. St. 239, 98 Am. Dec. 336; Muller v. Oaks Mfg. Co., 99 N. Y. Sup. (1906) 923, 113 App. Div. 689; Am. Digest (Master & Servant), sec. 89, p. 133; Conley v. Foundry Co., 14 Pa. Sup. Ct. 626; Am. Dig. (Master & Servant), sec. 89, p. 134; Labatt on Master & Servant, sec. 627, p. 1850; 4 Thompson's Com. on Negligence, secs. 3751-3753; Lenk v. Coal Co., 80 Mo. 381; Riley v. Railroad, 94 Mo. 600; Geary v. Railroad, 138 Mo. 251.

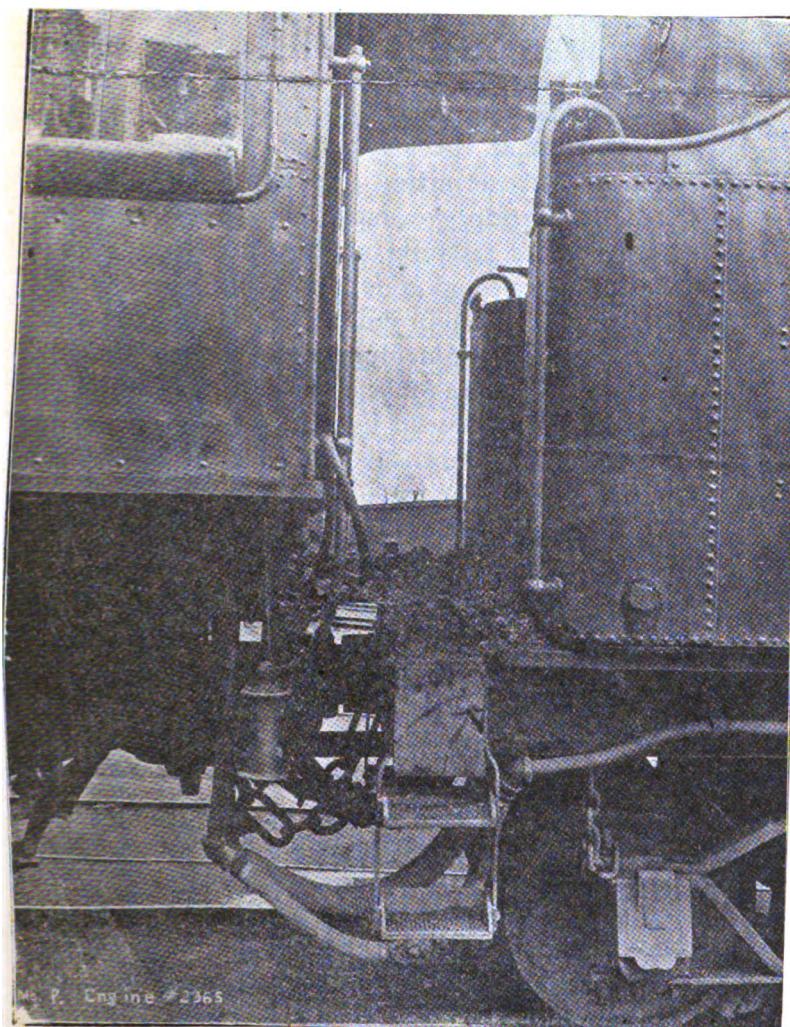
STATEMENT.—This was a suit for damages for personal injuries. The plaintiff recovered judgment and defendant has appealed.

It appears from the evidence that Earl E. Rhea was in the employ of the defendant railway company as a fireman on one of its engines running between Kansas City and Joplin, and that on November 20, 1910, at about noon, he reached Joplin, and went to his room and slept until five or six o'clock in the afternoon, and then, according to the custom of the defendant's firemen, went to defendant's roundhouse in the discharge of his duty as fireman to look after the engine on which he would make the night run to Kansas City; his duty in that particular was to see that the lamps were properly oiled and that the steam had been properly gotten up in the engine before starting on the trip; that in attending to those duties at the roundhouse he climbed up into the engine cab and down to

the ground again some five or six times, and in doing so used the "grabiron" or "handhold" on which the interest in this case centers. There were two of the grabirons, one attached to the engine and one to the tender, and they were placed there by the defendant for the use of its employees in climbing upon and getting down from the cab of the engine. It appears that the engine was taken in charge by the hostler and his helper, their duty being to back the engine from the roundhouse to the defendant's station near Main street in the city of Joplin, and that at the time of plaintiff's injury the engine was in full control of the hostler and his helper. The train was scheduled to leave Joplin at 7:15 p. m. After plaintiff had attended to his duties at the roundhouse, according to his custom as well as that of other firemen of the defendant company, he rode on the engine from the roundhouse toward the station where the hostler and his helper would deliver control of the engine to the regular engineer and fireman. The plaintiff had no duties to perform in taking the engine from the roundhouse to the station. He rode for a time in the seat ordinarily used by the fireman but which on the trip from the roundhouse to the station was the seat of the hostler's helper. Soon after the engine started on its trip from the roundhouse to the station, plaintiff arose from the seat and stood in the gangway between the engine and tender and took hold of the grabirons. This position made him face the hostler with whom he was talking. The evidence shows that for a distance of one hundred or one hundred and fifty feet he stood in that position with his hands on the grabirons, and that as the engine approached Main street he stepped down to the bottom step of the engine, still holding to the grabirons, and that just as the engine came to Main street and as it was traveling from four to six miles an hour, he attempted to alight for the purpose of going to a

lunch room for a cup of coffee. He released his hold on the grabiron on the tender and swung out to alight, holding to the grabiron on the engine with his left hand; this grabiron turned and fell out, and plaintiff fell upon the track and one of his feet was run over and cut off by the wheel of the engine. The hostler did not know the plaintiff had been injured until he had run the engine on back some fifty or seventy-five feet to its regular stopping place at the station. The grabiron was found on the ground and was picked up and laid in the cab of the engine.

This grabiron on the engine is a long, iron bar, extending from the back of the cab at about the height of a man's hand who would be standing in the gangway, down to a point about even with the floor of the gangway. At the top, it is straight, and is held in place by two sockets through which it passes—eye-sockets or rings go around the bar and hold it in place—and in the top eye-socket there is a set screw which holds the bar solid and firm. At the bottom, the bar curves in toward the engine and fits into a socket, and the socket at the lower end and the set screw at the top eye-socket keep the grabiron solid and secure in its place. A photograph of that part of the engine, which was exhibited to the jury, is here reproduced.



The defendant company has a rule that all engines must be inspected in the roundhouse at their terminals. The proof in this case is that while there was no regular inspector kept at Joplin by the defendant, the engines were inspected by boiler-makers and mechanics who worked in and about the roundhouse.

The defendant also has a rule prohibiting trainmen from getting off and on trains when they are in too rapid motion.

The negligence charged in the plaintiff's petition is that the defendant carelessly and negligently suffered, allowed and permitted the set screw which passed through the top eye-socket and which held the grabiron firmly and securely in its proper place and position to be lost out and gone therefrom, and that by a failure to make proper and timely inspection the defendant was guilty of negligence, and that the appliance was out of repair for such a length of time that the defendant knew or could have known by the exercise of ordinary care and inspection that the set screw was gone and the appliance unsafe.

The defendant denies its negligence and contends that the evidence fails to disclose the loss of the screw or the defective condition for such a length of time before the injury as to have allowed the defendant to have discovered it and remedied it; and further contends that plaintiff cannot recover because of his own negligence in electing to alight from the engine at the time he did and for the purpose testified to when he could have waited until the engine had gone seventy-five or one hundred feet farther and alighted when it would have been standing still. Defendant disclosed its theory of the case by offering and standing upon a peremptory instruction presented at the close of the plaintiff's evidence, and refusing to introduce any evidence in its own behalf.

OPINION.

FARRINGTON, J. (*after stating the facts*).—The appellant (defendant) excepted to the action of the trial court in refusing plaintiff's instruction numbered two which defines the duty of the master and servant in

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the furnishing and handling of appliances. This instruction was proper and might well have been given; but the instructions which were given clearly instructed the jury concerning the duty of the defendant to exercise ordinary care and diligence in furnishing the appliance, and instructed that if they should find that the plaintiff was guilty of contributory negligence in the manner in which he alighted, they should find for the defendant. While the instruction which was refused would have been entirely proper, the failure to give it in the presence of all the instructions which were given does not constitute reversible error. Moreover, a party cannot except to the opinion of the court refusing instructions to the jury moved by the adverse party. [Bailey v. Campbell, 2 Ill. (1 Scam.) 47.]

The appellant contends that the evidence in this case discloses a state of facts from which the defendant would not and could not have known of the defect, namely, that the set screw was gone, for a sufficient length of time to charge it with notice, and that it was erroneous to submit that question to the jury and therefore defendant's proffered peremptory instruction should have been given.

In support of this position, appellant urges the doctrine laid down in the case of Glasscock v. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364, and other cases cited in the brief declaring the same rule. As a first consideration, that case turned upon the question of contributory negligence, as the final point in the opinion fully discloses. However, the court in that case does lay down a rule which is applicable here, to-wit: Proof of negligence is not conjectural where established by facts from which a logical inference may be drawn that the defect caused the accident. In the Glasscock case, the opinion shows that the break in the rope did not come about by gradual wear and tear, but was such as would be made when a sudden force

was applied to the rope, it being too short—having been tied before the accident—of which defendant had no knowledge in time to have remedied it. In the case before us, appellant argues that because plaintiff climbed up and down five or six times within thirty minutes of the time of the injury, and stood holding to the grabiron while riding toward the station and discovered nothing wrong or loose about the grabiron, the only reasonable inference that could be drawn is that the set screw had not come out of the eye-socket or was not out for such a period of time prior to the injury that defendant would have or could be charged with knowledge of the defect in time to have remedied it. In the Glasscock case the elevator had been running all morning and the rope subjected to exactly the same strain as was exerted upon it when it broke, whereas, in this case there is no evidence that the grabiron had been subjected to the same strain by the plaintiff or anyone else within such short time before the injury occurred. True, there is evidence that plaintiff climbed up and down five or six times while the engine was standing in the roundhouse and that he had his hand on this grabiron a moment before getting down upon the lower step to swing off; but from the construction of this appliance, the picture of which was before the jury, it could reasonably be inferred that the force applied to it in going up and down when the engine was standing still would not tend to pull the grabiron out of its socket at the lower end and that in fact it would rather tend to hold it in its place; that by standing in the gangway of the engine and holding to it, although the engine was moving, would likewise have no tendency to pull the grabiron from the lower socket. The evidence shows that the grabiron came loose and fell out when plaintiff had released his hold on the grabiron which was attached to the tender and swung out away from the engine in

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the act of alighting. This would plainly exert a force on the appliance that would cause it to be loose and come out at the bottom, and the screw being out at the top, the grabiron could turn and drop to the ground; and the jury had all the facts and circumstances before it and could reasonably infer that this was exactly what occurred, as the grabiron was found on the ground after the injury and no trace was found of the screw. The evidence showed that in backing, the engine was not subjected to any unusual bumping or jarring such as would tend to loosen a tight screw, and the jury could reasonably and logically infer that the screw was not in its place when the engine left the roundhouse. It would be no unreasonable inference from the testimony in this record that the screw was in fact out of its place when the engine left the roundhouse—a place of inspection—for such a length of time that by the exercise of ordinary care the defendant could have discovered the defect and remedied it. In the Glasscock case, the evidence is that the operator, according to his own story, was guilty of contributory negligence in not reporting the fact that the gate was striking the pulley, while in this case there is no proof whatever that plaintiff had any knowledge that the appliance was not in proper working order. We conclude, therefore, that the facts of this case do not show that the appliance became defective within so short a time prior to the injury that the defendant could not in the exercise of ordinary care have discovered and remedied it; but that, on the other hand, the jury could under all the evidence reasonably find that the appliance became defective on account of the screw being out and that it was out for such a length of time as to impute knowledge of the defect to the defendant.

There is an ever present duty resting on the master to use ordinary care to furnish reasonably safe appliances and such duty is a continuing one—he must keep the appliances in proper repair so far as it can

be done by the exercise of ordinary care, diligence and inspection; and in the absence of knowledge of such defect being brought home to the employee, he has a right to rely upon the master faithfully performing that duty. [Parsons v. Railway Co., 94 Mo. 286, 292, 6 S. W. 464; Parker v. Railway Co., 109 Mo. 362, 392, 19 S. W. 1119.]

What was said in the case of *Gutridge v. Railway Co.*, 105 Mo. at pages 526 and 527, 16 S. W. 943, where the handhold on a box car gave way resulting in injury, is strikingly applicable. The court in that case in another part of the opinion used the following language: "Defendant contends also that the court erred in permitting plaintiff to prove the condition of the handhold and the car after the accident. This point is not well taken. Plaintiff in order to recover was required to prove, first, that the handhold was not safe, and, second, that defendant knew, or by the exercise of ordinary care might have known, it was not safe. It seems to us the only method open to plaintiff, to prove the defectiveness of the appliance, was to prove how it was fastened, and what condition the screws and wood were in immediately after the accident."

In the present case, plaintiff showed the condition of the appliance immediately after the injury—that the screw was out; that when he started to swing off, the grabiron turned and caused him to fall to his injury; that the threads shown in the eye-socket looked good and that there was no handling of the engine between the roundhouse and the place of injury from which it could be reasonably inferred that a screw which was in perfect condition at the roundhouse could work loose and come out in so short a distance. Indeed, appellant itself contends that the evidence conclusively shows that the screw was tight in its place when the engine was within one hundred feet of the place of the injury.

The picture of the engine and grabiron, which was before the jury, shows that this appliance is in no wise intricate, and that there was no need of expert testimony to explain to the jury how it could work loose or whether it would work up or down. A look at the picture reveals that merely pulling straight up or down in climbing on or off a standing engine would not tend to pull the lower end of the grabiron out of its socket, and so long as it remained in the socket at the lower end it is plainly seen that it would not and could not turn. Had the evidence shown that plaintiff or some one else had swung off of this moving engine five or six times within thirty minutes of the time of the injury to plaintiff, exerting an outward force such as plaintiff did when it gave way, and that it failed to give way, then the conditions might bring the defendant within the rule it seeks to invoke; but no such strain is shown to have been put upon it; at least not that day by the plaintiff.

The jury had a right to infer that a screw, tight in its place, in threads of iron in good shape holding it to its place, will not work out and become loose in the short distance this engine traveled from the roundhouse to the place of the injury; and the jury certainly had enough evidence before it to justify a finding that this screw was not in place when the engine left the roundhouse where it had been left to be inspected and prepared for its night run. With that fact found, it became a question for their determination whether the defendant exercised such reasonable care and inspection as to have discovered the fact that it was missing or that it was loose. The jury has passed on that issue under the instructions given, and so much is settled for all time.

Appellant cites *Warner v. Railway Co.*, 178 Mo. l. c. 134, 77 S. W. 67, and *Goransson v. Riter-Conley Mfg. Co.*, 186 Mo. l. c. 307, 85 S. W. 338, in support of

the following contention: "If the injury may have resulted from one of two causes, for one of which, and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which defendant is liable produced the result, and if the evidence leaves it to conjecture, the plaintiff must fail in his action." We see no application to this case of the rule announced in those cases, because, in the absence of contributory negligence, which will be discussed presently, it is uncontroverted that the cause of the fall to his injury was occasioned by the giving way of the grabiron.

It is contended by appellant that because plaintiff could have remained on the engine until it traveled seventy-five or one hundred feet where it would have stopped and he could have alighted without danger, and since, therefore, he had two courses open to him, one safer than the other, and he voluntarily chose the way that was less safe, he was guilty of such contributory negligence as would preclude him from recovering—that he was guilty of negligence as a matter of law.

We understand the rule to be that where the servant of his own free will chooses an unsafe manner of doing his work or using his master's appliances when other and safer ways are at hand, he will not be permitted to recover for an injury, provided the way he has chosen is so dangerous that an ordinarily prudent person would not have undertaken it as he did. The following rule is given in 26 Cyc. 1250; "It is not contributory negligence on the part of a servant to follow a custom habitually followed by his fellow-servants, to the knowledge of the master, unless the danger is so obvious that an ordinarily prudent person would refuse to take the risk arising from such a method of work." The fact that the servant did not take the course that was absolutely safe, but instead chose a less safe way is some evidence from which it could be

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inferred that he was guilty of contributory negligence; but before the court can say that the inference becomes conclusive as a matter of law; it must be shown that the way in which he did it was one that a reasonably prudent person would not have attempted.

We think the rule in reference to what constitutes contributory negligence on the part of a servant who has an absolutely safe way to get off an engine and one that is not so safe is and should be the same as that declared in the sidewalk cases in this State. It is apparent that when a person come to a defective looking place in a sidewalk, the absolutely safe way would be to turn back and go over some other street that is safe, yet if he chooses to go over the defective place he will not be held guilty of negligence as a matter of law unless the danger was so apparent that a person in the exercise of reasonable care for his own safety, would not have taken the course. Our Supreme Court, in such a case, used this language: "The knowledge of plaintiff is only a circumstance to go to the jury in determining the question whether in attempting to use the walk on the night in question she was exercising the care of an ordinarily prudent person under like circumstances. The court is warranted in acting only in those cases where by giving to the plaintiff the benefit of every reasonable inference that may be drawn from her testimony and the surrounding facts, no other conclusions could fairly be reached than that she disregarded all rules of common prudence and caution in the act assumed. When known or manifest danger is assumed or deliberately undertaken, the court can declare the legal effect thereof by a mandatory instruction, as was attempted in this case, but when the thing undertaken is such that men or women of ordinary intelligence might reasonably differ as to the hazard of the act, the question is one of fact for the jury to determine. Nor can it be said as further contended by defendant that plaintiff was bound to abandon the use

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of the sidewalk in question and pursue another course home from the simple reason that the walk was known to her to have been out or repair, or be charged with all the consequences that did actually attend the attempted use of the same, without regard to the question of reasonable care and caution on her part." [Graney v. City of St. Louis, 141 Mo. 180, 185, 42 S. W. 941.] The same rule has been followed in Loftis v. Kansas City, 156 Mo. App. 683, 137 S. W. 993; Heberling v. City of Warrensburg, 204 Mo. 604, 103 S. W. 36; Chilton v. City of St. Joseph, 143 Mo. 192, 42 S. W. 766; Perrette v. Kansas City, 162 Mo. 238, 62 S. W. 448; Coffey v. City of Carthage, 186 Mo. 573, 85 S. W. 532; Howard v. City of New Madrid, 148 Mo. App. 57, 127 S. W. 630.

In those cases in this State where the unsafe way was used by the servant and declared in law to be contributory negligence, the way that was used was not only unsafe, but was apparently, dangerously, unsafe. See, George v. St. Louis Mfg. Co., 159 Mo. 333, 59 S. W. 1097; Montgomery v. Railway Co., 109 Mo. App. 88, 83 S. W. 66; and there are numerous cases to the same effect.

We are cited to the case of Hirsch v. Freund Bros. Bread Co., 150 Mo. App. at page 172, 129 S. W. 1060. A sentence on this page, standing alone, would seem to hold that the servant must choose the safest method and that a failure to do so constitutes negligence, but in the course of the statement and in the opinion the learned judge expressly shows that the method employed was the one where "the particular danger which befell him was open and obvious." Plaintiff in that case placed his hand in an obviously dangerous place, which, of course, barred a recovery.

Appellant also cites the case of Hurst v. Railroad, 163 Mo. 309, 63 S. W. 695, where the court held that the injured party was guilty of contributory negligence as a matter of law in attempting to board a ca-

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boose that was running at a rate of six miles per hour. The court in that case found under the facts as a matter of law that the attempt to board the train was dangerous. The court did not decide that it was negligence as a matter of law for the employee to board a train going at a rate of six miles an hour, but did hold that an attempt to board a train going at that rate at the place where the employee attempted to do so—where the ground was obviously unsafe—was, in law, dangerous, and negligent. In that case, the danger, to-wit, the rocks and chat left on the roadbed by the master, was visible and apparent to the employee, and it took the speed of the train coupled with this obviously unsafe condition of the track, both of which were known to the employee, to constitute negligence in law. In the case before us, it was not the speed of the train that caused the injury; it was not anything that was obvious or that was known to the plaintiff that caused the injury. If he had alighted from the engine, traveling at the speed it was, and had stepped upon some place that was apparently, obviously unsafe, then he could be charged with doing that which a reasonably prudent person under the same or similar circumstances would not have done, but the evidence shows that Main street where plaintiff attempted to alight was smooth and even. The hidden danger in the grabiron caused plaintiff's injury. Had there been any evidence that he knew the grabiron was unsafe and he had attempted to alight when the engine was running at the speed mentioned, there would be some ground for the contention that he was guilty of negligence as a matter of law. But we do not believe a court can say in this case that a railroad man attempting to get off an engine going at a rate of six miles an hour when he thought the safety appliances were in proper condition, and the place where he attempts to alight is safe, did as a matter of law do that which an ordinarily prudent person in the exercise of

ordinary care under the same or similar circumstances would say was dangerous to the extent that he would be charged with negligence as a matter of law. It is a question about which reasonable minds might differ as to the hazards connected with the act, and that being true, should be submitted to the jury under proper instructions. In short, the distinction between the Hurst case and this case that the dangerous place was obvious and known to the plaintiff in that case, and the defective condition of the appliance was hidden and unknown to the plaintiff in this case. The question here is not concerning the choosing between a safe way and an obviously dangerous way of getting off the engine. It was for the jury to say whether the way in which plaintiff attempted to alight was a reasonably safe way. The true rule is laid down in the case of Richardson v. Railroad, 223 Mo. 325, 123 S. W. 22, where the Hurst case is cited and commented on. On pages 338 and 339, the court used this language: "At the time respondent was injured he and Lowry were attempting to couple the engine tank and stock car as they separated, and not by bringing them together. This was considered to be a safe plan whether it worked or not. The simple fact that respondent was hurt and that the coupler on the engine tank was out of order, does not conclusively show that he was guilty of contributory negligence. The result is not the true test, and the mere fact that a servant is injured because of the way of performing a duty which he selected, when if he had selected the other way injury would have been avoided, would not authorize the conclusion that he was careless."

To declare a different rule than that which we have pointed out in this case would require a greater degree of care on the part of the servant than is exacted of the master. The employer is not required to furnish the *safest* place and the *most modern* appliances; he must exercise ordinary care in their selec-

tion and in keeping them in repair. Likewise, the servant is not required to use the appliances furnished him with the *utmost* care—the care the most prudent man might exercise; he is held only to that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances.

The rule of the defendant company warning employees about getting on or off trains in too rapid motion necessarily implies that the employees may get on or off trains that are moving under conditions and circumstances that are apparently safe; so that as to whether the plaintiff was guilty of contributory negligence for violating the rule of the company resolves itself into a question of fact which the jury passed upon when it decided whether plaintiff's act was such as an ordinarily prudent man would have attempted.

We hold that the question as to whether or not there was contributory negligence was a proper one to be submitted to the jury in this case.

It is true that while plaintiff was riding from the roundhouse to the station he was not at the time in control of the engine. But it was his duty to go to the roundhouse and prepare the engine for the trip, which he had done, and it was customary for him to ride back from the roundhouse to the station, where, within a few minutes, the engine was to be turned over to him and the regular engineer. He was clearly within the line of his employment from the time he went to the roundhouse until he fell and was injured. It was his duty to be at the station a reasonable length of time before his train started and it was scheduled to leave within about ten or fifteen minutes after the time of plaintiff's injury. In swinging off for the purpose of going to a near-by lunch room for a cup of coffee, while it cannot be said to be an act necessary to be done for the defendant company, it is one of the usual incidents of the service. Plaintiff was on the engine in the course of his employment, and the at-

tempt to alight was not unusual, unwarranted, unlawful, or unnecessary. It was his duty and his privilege to refresh himself and keep himself in such condition physically as to perform the duties required of him; to this end, a man must eat and drink; and by doing so as the evidence in this case discloses he certainly could not be said to have voluntarily left his employment, nor to have been using the appliances furnished him by the master for a purpose for which they were not intended.

Entertaining the views herein expressed, we hold that the case was properly submitted to the jury under instructions that correctly declared the law. Finding no error, the judgment is affirmed. All concur.

JOHN SUMMERS et al., Appellants, v. W. C. CORDELL et al., Respondents.

Springfield Court of Appeals, May 5, 1913.

COURTS: Jurisdiction: Establishing County Road: Injunction Against: Supreme Court's Appellate Jurisdiction. An action to enjoin the opening of a roadway, where the validity of the proceedings establishing the same is questioned, is within the appellate jurisdiction of the Supreme Court and not of the Court of Appeals, since the title to real estate is involved.

Appeal from Howell County Circuit Court.—*Hon. W. N. Evans, Judge.*

TRANSFERRED TO THE SUPREME COURT.

J. N. Burroughs for appellants.

(1) Injunction will lie to prevent the opening of a road on a void order. Carpenter v. Grisham, 59 Mo. 247; Jones v. Zink, 65 Mo. App. 409; Spurlock v. Dornan, 182 Mo. 242. (2) Every jurisdictional fact must appear on the face of the record. Spurlock v. Dornan, 182 Mo. 242; Jones v. Zink, 65 Mo. App. 409. (3) Pro-

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ceeding is void when record fails to show that commissioners were not of kin, not interested in the matter and are resident freeholders. Jones v. Zink, 65 Mo. App. 409; City of Tarkio v. Clark, 186 Mo. 298; Grossman v. Patton, 186 Mo. 669.

No brief for respondents.

FARRINGTON, J.—On December 4, 1911, appellants filed their petition in the circuit court of Howell county against the respondents, Cordell, Vaughn and Ballew, as members of the county court, and Offield as road overseer, alleging that said county court had entered an order of record, ordering and establishing a new public road in Spring Creek township (describing the road), and requiring Offield as road overseer to open said road at the expiration of one hundred days from the date of such order; that plaintiffs are landowners along the proposed new public road and that each refuses to give the right of way for said road; that the said Offield as overseer is threatening to open said road and is about to proceed to open the same, and will, if not prevented by order of the court, proceed immediately to open said road, to tear down the fences of these plaintiffs and move the same back a sufficient distance to acquire land for said road, and will appropriate the land of these plaintiffs for such purpose. It is then alleged in the petition that the said order of the county court is wholly void, setting forth numerous reasons, all of which go to the validity of the proceedings of the county court. The prayer is for injunctive relief.

Defendants for answer denied each and every allegation of the petition except that they are the officers charged in the petition and that they are proceeding to open the road in question, but that they are proceeding under a valid order of the county court.

Upon a hearing before the trial judge, the plaintiffs' petition was dismissed. Among other grounds

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alleged in plaintiffs' motion for a new trial, is the following: "Under the law and the evidence the order of the county court opening the road in question was wholly void." Appellants in their statement, in their brief, and in their argument forcefully contend that the order of the county court opening the road was wholly void.

Under the ruling in the case of Monroe v. Crawford, 163 Mo. 178, 63 S. W. 373, it is clear that the appeal herein should have been lodged in the Supreme Court. It is the well-established rule that an action to enjoin the opening of a road, where the validity of the proceedings establishing the same is questioned, is within the appellate jurisdiction of the Supreme Court as involving the title to real estate. The order of the county court in this case, if permitted to stand, would charge appellants' real estate with an easement, and thereby establish a public highway over their land in favor of Howell county; and the order would divest that much of the title and interest in and to said land out of appellants and invest the same in Howell county. [State ex rel. Gavin v. Muench, 225 Mo. l. c. 227, 124 S. W. 1124. See, also, State ex rel. Galbraith v. McCutchan, 119 Mo. App. l. c. 75, 96 S. W. 251.] Under the statute (Sec. 3938, R. S. 1909) this cause is ordered transferred to the Supreme Court. All concur.

W. R. BINGAMAN et al., Appellants, v. J. M. HANNAH et al., Respondents.

Springfield Court of Appeals, May 5, 1913.

1. **JURISDICTION: Courts of Appeal: Should Settle Questions Concerning.** It is the duty of the appellate court to settle questions concerning its jurisdiction of an appeal, although such jurisdiction has not been directly questioned by the parties to the suit.

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2. **COURTS OF APPEAL: Jurisdiction: Determined by Examination of Entire Record.** In order to determine its jurisdiction of an appeal, an appellate court will examine not only the pleadings and judgment but the entire record, and if there is any doubt as to its jurisdiction in the matter, will transfer the case to the Supreme Court.
3. **WILLS: Contest Concerning: Title to Real Estate Involved: Jurisdiction in Supreme Court.** In a suit concerning a will, neither the pleadings nor judgment contained any intimation that real estate was involved in the cause appealed. The bill of exceptions contained evidence indicating that certain real estate was owned by the testator at the time of his death, which was disposed of by the will. *Held*, that the appeal involved title to real estate within the meaning of Art. 6, Sec. 12 of the Constitution and the cause should be transferred to the Supreme Court under Sec. 3938, R. S. 1909

Appeal from Wright County Circuit Court.—*Hon. C. H. Skinker*, Judge.

TRANSFERRED TO THE SUPREME COURT.

J. N. Burroughs for appellants.

(1) Where there is no evidence tending to show that the testatrix had any knowledge of the contents of the will as drawn, and where it does not dispose of her property as she had desired and had directed it will be held that it was not the will of the testatrix. *Bradford v. Blossom*, 207 Mo. 177. (2) The burden is on the proponents to prove the due execution of the will and that the testator had mental capacity to know and understand what he was doing. That burden they must assume even though contestants introduced no evidence. *Cowan v. Shaver*, 197 Mo. 203. (3) The provision of the statute which requires that every will shall be signed by the testator or by some person by his direction is mandatory; and if it is not complied with the will is void. *Hospital Association v. Williams*, 19 Mo. 609; *Simpson v. Simpson*, 27 Mo. 288; *Elliott v. Welby*, 13 Mo. App. 19; *Catlett v. Catlett*, 55 Mo. 330; *Walton v. Kendrick*, 122 Mo. 504. (4) Upon the

issue of *devisavit vel non*, the court should take the proof and establish or reject the will. *McMahon v. McMahon*, 100 Mo. 99; *Benoist v. Murrin*, 48 Mo. 48; *Jackson v. Hardin*, 83 Mo. 184; *Hughes v. Burriss*, 85 Mo. 665; *Bradford v. Blossom*, 207 Mo. 228. (5) The motion of plaintiffs to strike out the amended answer of defendants was well taken and should have been sustained. The amended answer was directly and absolutely contradictory of the original answer. It was a stultification of defendants and is not permitted under the law. An admission contained in a pleading is conclusive on the pleader. *Kessner v. Phillips*, 189 Mo. 515-528. (6) Where the answer contains a general denial, there can be no implied admission of any fact stated in the petition. *State to use v. Samuels*, 28 Mo. App. 649.

Green, Wayland & Green for respondents.

(1) The influence of a wife or a child upon a testator will not avoid the will, if the influence is exercised or exerted in a reasonable manner without fraud or deception. *Crowson v. Crowson*, 172 Mo. 691; *Thompson v. Ish*, 99 Mo. 160; *Maddox v. Maddox*, 114 Mo. 35; *Bonsal v. Randall*, 192 Mo. 525. (2) Testimony of the declarations of the testator was proper, for the reason that it showed a fixed and definite purpose of long standing on part of the testator to give his wife the property in controversy. *Jones v. Thomas*, 218 Mo. 508. (3) Amendments are favored and should be liberally allowed in favor of justice. *House v. Duncan*, 50 Mo. 453; *Carry v. Moss*, 87 Mo. 447. (4) The discretion of the trial court will not be interfered with on appeal unless it is manifest that it has been abused. *Carr v. Moss*, *supra*. (5) If the wife (or husband), is a party to the suit and has a real interest in the subject which would be affected by the judgment, then she (or he) is a competent witness. *Layson v.*

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Cooper, 174 Mo. 223; Dunifer v. Jecko, 87 Mo. 285; Stefen v. Bauer, 70 Mo. 399; Wood v. Bradley, 76 Mo. 33; Bell et al. v. Railroad, 86 Mo. 73; O'Brien v. Allen, 95 Mo. 73; Sec. 6345, R. S. 1909. (6) Perfect soundness of mind is not essential to testamentary capacity. A testator may be afflicted with any of a variety of mental weaknesses, disorders or peculiarities and still be capable in law of executing a valid will. Sehr v. Lendemann, 153 Mo. 276; Hamon v. Hamon, 180 Mo. 685. (7) The rule in this State is, that one who is capable of comprehending all of his property and all persons who reasonably come within the range of his bounty, and who has sufficient intelligence to understand his ordinary business, and to know what disposition he is making of his property, has sufficient capacity to make a will. Holton v. Cochran, 208 Mo. 314; Riggan v. College, 160 Mo. 570; Weston v. Hanson, 212 Mo. 248; Hughes v. Rader, 183 Mo. 63. (8) The credibility of witnesses and the weight to be given to the evidence is for the determination of the trial court and jury, and that determination is conclusive on appeal. Gregory v. Chambers, 78 Mo. App. 294; Lalor v. McDonald's Admr., 44 Mo. App. 439; Polhans v. Railroad, 45 Mo. App. 153; Hurst v. Scammon, 63 Mo. App. 634; Saetelle v. Insurance Co., 87 Mo. App. 509; Love v. Insurance Co., 92 Mo. App. 192; Golden v. Tyler, 180 Mo. 196; State v. Murphy, 46 Mo. 347; Gibson v. Railroad, 8 Mo. App. 488; Walker v. Owens, 25 Mo. App. 587; Herriman v. Railroad, 27 Mo. App. 435; Tower v. Pouley, 76 Mo. App. 287.

FARRINGTON, J.—This is an appeal of a will contest. At the threshold of the case is presented the question of our jurisdiction under Sec. 12 of Art. 6, of the Constitution which vests appellate jurisdiction in the Supreme Court in cases involving the title to real estate. While the point has been merely suggested by counsel and not insisted on, it is one of our duties

to settle questions concerning our own jurisdiction in order that our time may not be consumed in doing things that would carry no legal force. [Springfield S. W. Ry. Co. v. Schweitzer, 246 Mo. 122, 151 S. W. 128, 130; Ferguson v. Comfort, 159 Mo. App. 30, 139 S. W. 218.]

There is nothing in the pleadings in this case to indicate that real estate is in any way involved. The judgment follows the customary form, containing no intimation that real estate is involved, and merely sustaining the will. Looking to the bill of exceptions, we find the will, and there are contained in it seven items in the following form, except that a different person is named in each item: "I give, devise and bequeath unto my brother, William Bingaman, the sum of one and no/100—\$1.00—dollars." The tenth item in the will is as follows: "I give, devise and bequeath unto my wife, Belle Bingaman, all the property I may have at the time of my death after paying the above-named bequests." In the seven items preceding, the word "devise" was used, although each item obviously covered a mere bequest, and in the tenth item the same form was used, so that the will itself is devoid of anything indicating that the testator left real estate. The evidence must be read in order to ascertain that at the time of his death the testator owned sixty acres of land, which, of course, was disposed of by the will.

Upon such a record, where is the appellate jurisdiction of a contest of the will?

A glance at the cases of Karl v. Gabel, 48 Mo. App. 517, and Moore v. McNulty, 76 Mo. App. 379, would seem to settle the question against our jurisdiction. The Moore case was subsequently decided by the Supreme Court (164 Mo. 111, 64 S. W. 159), but we find no decision of that court in the Karl case. The Supreme Court transferred to the St. Louis Court of Appeals a case entitled Ortt v. Leonhardt and must have looked to the evidence in the case to determine its

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jurisdiction from what is said in the report of the case when first decided by the St. Louis court in 68 S. W. 577, 578, which opinion did not get into the official reports, and another opinion was written a year later (102 Mo. App. 38, 74 S. W. 423).

But this court decided the case of *Berst v. Moxom*, 157 Mo. App. 342, 138 S. W. 74, and the opinion recites that the petition alleged that deceased owned a large farm. The case again came up on appeal and is reported in 163 Mo. App. 123, 145 S. W. 857, but the question of the jurisdiction of this court was not raised on either appeal. In *Schaff v. Peters*, 111 Mo. App. 447, 451, 90 S. W. 1037, the will, which is copied in the opinion, shows that real estate was involved. The same is true of *Metz v. Wright*, 116 Mo. App. l. c. 640, 92 S. W. 1125, *Pratt v. Railroad*, 130 Mo. App. l. c. 178, 108 S. W. 1099, and numerous other cases which have been finally determined in the Courts of Appeals.

In *Barber Asphalt Paving Co. v. Hezel*, 138 Mo. l. c. 230, 39 S. W. 781, the Supreme Court said: ". . . before this court can assert its exclusive appellate jurisdiction in such cases the title to real estate must be involved in the suit itself, and be a matter about which there is a contest. It is not enough that the judgment when carried into execution will affect the title to the land." Other cases: "The judgment to be rendered must directly affect the title itself to the real estate." [*Price v. Blankenship*, 144 Mo. l. c. 209, 45 S. W. 1123.] "These decisions do not hold, however, that to give this court jurisdiction in such case the title to the land must be settled by the judgment, but that it must be directly affected. A suit in equity, for example, wherein the validity of a mortgage or other deed affecting title to real estate is in question, is within the provision of the Constitution." [*Edwards v. Railway*, 148 Mo. l. c. 515, 516, 50 S. W. 89.] "Title to real estate is not involved within the

meaning of the Constitution that defines the jurisdiction of this court unless the judgment itself affects the title." [Jones v. Hogan, 211 Mo. l. c. 47, 109 S. W. 641.] ". . . the judgment itself must directly affect the title, and the distinction has been drawn between judgments that directly affect the title and judgments that may result in title being affected." [Loewenstein v. Insurance Co., 227 Mo. l. c. 128, 127 S. W. 72.]

The St. Louis Court of Appeals in an early case used this language: "In determining the question whether this is a case 'involving title to real estate,' within the meaning of article 6, section 12, of the State Constitution, it seems only necessary to discriminate between cases which clearly belong to that class, and controversies which relate merely to the conveyance of realty from one party to another. In a suit to enforce specific performance of a contract for the purchase or sale of land, the final adjudication settles nothing as to the positive title. That, so far as the whole controversy is concerned, may reside in a third party, or may have never emanated from the government. The only controversy is over a question of personal duty in the execution or acceptance of a deed from one party to another. Such a case is therefore not one 'involving title to real estate.' It is like many others in which, although the final judgment may have a controlling influence on a transmission of the title, yet does not adjudicate the title itself." [Dunn v. Miller, 18 Mo. App. 136.] The last sentence quoted would seem to apply to the case before us.

In Brannock v. Magoon, 216 Mo. l. c. 727, 116 S. W. 500, the Supreme Court said: "We must look to the judgment in the case to determine our jurisdiction. If the judgment is such as to involve the title of real estate, then we should assume jurisdiction, but if not, we should not assume jurisdiction." And in Springfield S. W. Ry. Co. v. Schweitzer, 246 Mo. 122, 151 S. W. 128, 130: "To confer jurisdiction, in a con-

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stitutional sense, the *judgment appealed from* must involve title to real estate, and such title must be directly affected thereby.” Are we to understand that we are to look to the judgment alone in determining our jurisdiction? If so, the jurisdiction of this appeal is with us.

Now we find the following language in State ex rel. Hartley v. Rombauer, 130 Mo. l. c. 290, 32 S. W. 660: “The appeal is heard upon the whole record and the appellate court can look to that in order to determine its jurisdiction.” See, also, Wilson v. Russler, 162 Mo. l. c. 567, 63 S. W. 370, to the same effect.

The Supreme Court in Kennedy v. Duncan, 224 Mo. l. c. 666, 123 S. W. 856, used this language: “ . . . this court cannot entertain the cause on the idea that title to real estate is involved unless it so appears on the face of the judgment. The converse of the proposition is also true; if the judgment on its face should purport to dispose of the title to real estate although the pleadings did not call for it, the appeal would have to come here for review, because the judgment on its face would affect the title and this court only could reverse it on the ground that it was beyond the issues presented by the pleadings.”

In Turner v. Morris, 222 Mo. l. c. 23, 121 S. W. 9, it is said: “ . . . before an appeal can be entertained by this court on the ground that title to real property is involved . . . the record must show that the title to the real estate mentioned in the pleadings will be directly affected by the judgment or decree to be rendered in the cause.”

And in State v. Brisco, 237 Mo. l. c. 157, 135 S. W. 58, 140 S. W. 885: “The Constitution fixes the appellate jurisdiction of this court, and in a given case the record alone must determine whether jurisdiction on appeal is in this court or the Court of Appeals.”

That is, the Supreme Court will not look to something which is not properly a part of the record.

Unless it is held that in determining the question of appellate jurisdiction, the court may look beyond the pleadings and judgment and to the testimony of the witnesses which appears in the bill of exceptions, the appeal in this case has been properly lodged in this court, although our decision would operate to sustain the title of Belle Bingaman to sixty acres of land or to strike it down and thus vest title thereto in the heirs of the testator. As to Belle Bingaman and those who claim under her, the will of the testator is a muniment of title to real estate, and it is our opinion that the final adjudication of the will contest should be by the Supreme Court. It would seem that the safe rule for the Courts of Appeals to adhere to is one which permits them to examine the *entire record* in order to determine their jurisdiction, and if there is doubt, transfer the case to the Supreme Court. [Null v. Howell, 40 Mo. App. 329; Musicke v. Railroad, 43 Mo. App. 326; State v. Dinnisse, 41 Mo. App. 22; In re Opening Essex Avenue, 44 Mo. App. 288; Bache v. Hammett, 61 Mo. App. 457.]

Under the statute (Sec. 3938, R. S. 1909) this cause is ordered transferred to the Supreme Court. All concur.

CITIZENS BANK OF POMONA, Respondent, v. P. M. MARTIN AND LULIE MARTIN, Appellants.

Springfield Court of Appeals, May 5, 1913.

1. **JUDGMENT: BY DEFAULT: Setting Aside: Requirements for.** The setting aside of a judgment by default is addressed to the sound discretion of the trial court and to justify that court in setting aside such judgment the defendant must show (1) that he had good reason for the default, and (2) that he

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has a meritorious defense; and both of these things must appear so clearly as to make it manifest that the refusal of the trial court was arbitrary.

2. **PROMISSORY NOTE: Liability on a Condition Only: Cannot Establish by Parol Evidence.** Parol evidence is not admissible to show that the maker of a note, which purports to be payable absolutely, only promised to pay on condition.
3. **JUDGMENT: By Default: Vacating: Proposed Defense Must be Meritorious.** A default judgment was entered against the defendants on certain promissory notes, payable absolutely. Five days thereafter a motion was filed to set aside same because of the illness of defendants' attorney at the time of hearing the case. Accompanying this motion was the answer of the defendants which set up as a defense to the notes an oral agreement at the time the notes were made to the effect that defendants were to have the use of the borrowed money until they could fatten certain hogs, to purchase which the money was borrowed. And that it was orally agreed at that time that the plaintiff bank should advance such additional sums of money as the defendants might need to purchase feed for the hogs until time for marketing same, which the bank refused to do; and except for such promises and agreements, defendants would not have borrowed the money or executed the notes in question. *Held*, that such answer did not show a meritorious defense to plaintiff's action and that the action of the trial court in refusing to set aside the default judgment was proper.

Appeal from Howell Circuit Court.—*Hon. W. N. Evans, Judge.*

AFFIRMED.

J. N. Burroughs for appellant.

- (1) The party cannot raise the defense of the Statute of Frauds where he has not pleaded it. Scharrff v. Klein, 27 Mo. App. 549; Hobart v. Murry, 54 Mo. App. 249; Hackworth v. Zeitinger, 48 Mo. App. 32. (2) The objection to the contract that it is within the Statute of Frauds cannot be raised by demurrer. Sherwood v. Sexton, 63 Mo. 78. (3) The statute only applies to promises made to the creditor and not to promises made to the debtor by the creditor. Howard

v. Coshow, 33 Mo. 118; Green v. Estes, 82 Mo. 337. (4) We do not see any provision of the Statute of Frauds that would require a contract set up in the answer to be in writing. If there were such provision the court took the matter upon itself to raise the question. It was not even raised by motion to strike out the pleading and motion tendered by defendants. There was not even an objection offered against it. We know of no rule that would permit a raising of this question by the court.

M. E. Morrow for respondent.

(1) A motion to vacate a default judgment filed more than four days after such judgment, is not the ordinary motion for a new trial, and cannot be so treated. Harkness v. Jarvis, 182 Mo. 235. (2) The action of the trial court on a motion to vacate a default judgment is largely a matter of his own discretion, as is the granting of new trials generally. Bank v. Armstrong, 92 Mo. 265; Scott v. Smith, 133 Mo. 618. (3) There is no error in a trial court's refusal to vacate, on motion, a default judgment regularly entered, when it appears that defendant had no defense. Shroeder v. Miller, 35 Mo. App. 227; Bridge v. Tierman, 36 Mo. 439. (4) The answer tendered by appellants to the trial court stated no legal defense whatever to respondent's action on the promissory notes. Bircher v. Payne, 7 Mo. 462; Atwood v. Lewis, 6 Mo. 392; Bridge v. Tierman, 36 Mo. 439. (5) It would have been a senseless ceremony to have permitted appellants to file their proffered answer, as parol evidence would have been inadmissible on trial to have sustained its allegations. Because a note absolute upon its face, and complete in its terms, obtained without fraud, cannot be changed into a conditional one by parol evidence. Jones v. Jeffreys, 17 Mo. 577; Benson v. Harrison, 39 Mo. 303; Massmann v. Holscher, 49 Mo.

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87; Jones v. Shaw, 67 Mo. 667; Wislizenus v. O'Fallon, 91 Mo. 184; Holloway v. Ins. Co., 48 Mo. App. 1; Keck v. Brewing Co., 22 Mo. App. 187; Higgins v. Cartwright, 25 Mo. App. 609; Reed v. Nicholson, 37 Mo. App. 646; Organ Co. v. Swartzell, 61 Mo. App. 490; Holmes v. Farris, 97 Mo. App. 305; Christian University v. Hoffman, 95 Mo. App. 488; Bank v. Reichert, 101 Mo. App. 253.

FARRINGTON, J.—This action was instituted on July 5, 1912, in the circuit court of Howell county. The petition declared on two promissory notes filed therewith, one dated November 11, 1911, due sixty days after date, for \$1200, with interest at eight per cent, signed by P. M. Martin, with credits thereon which reduced the principal to \$367.46, and the other dated February 1, 1912, due one day after date, for \$710.97, with interest at eight per cent, signed by P. M. Martin and Lulie Martin.

On the twelfth day of August, 1912, at the July term of the court, a default judgment was entered which recites that defendants were legally served with process in said action, and which gives plaintiff \$375.50 on the note first described and \$731 on the other. That this was proper is not disputed as defendants had filed no answer. [Secs. 2093 and 2098, R. S. 1909.] Five days thereafter, and on the last day of the term, defendants appeared and filed a motion which was sworn to by P. M. Martin, accompanied by an answer which they offered to file in the case. The verified motion sets up the following reason for their default: "Defendants had employed an attorney, Mr. Livingston, to represent them in said cause, to file answer and make defense for them; that said attorney by reason of continued illness during this term of court, had been unable to appear in court and look after their interests; that on account thereof these defendants

had made no appearance and had taken no steps to defend such action; that they had no knowledge of said conditions until after a judgment was rendered against them." It is then alleged that they have a meritorious defense, and they ask that the judgment rendered by default be set aside and that they be permitted to plead and make their defense to the action.

The answer which defendants offered to file admitted the execution of the notes, but set up the fact that the amounts evidenced by said notes were borrowed by defendants of the plaintiff under the following circumstances and conditions:

"The defendants informed plaintiff bank that they desired to borrow said sum of money for the purpose of investing in hogs to hold and feed through the winter and to put on the spring market; that they so informed the plaintiff bank, and that they would want to use said money for the purpose aforesaid until the spring following, and that they would need further sums of money with which to buy corn and feed to carry said stock through the winter and on to the spring market, and that unless they could get the use of the amount specified in said note until that time, and unless the plaintiff bank would further agree to furnish such further sums of money as defendants might need to feed and carry such stock through to the spring market as aforesaid, they would not borrow such sums as is evidenced by said notes, or make any investments in such hogs.

"Defendants further allege that the plaintiff bank then and there agreed to loan defendants said sums of money on the terms and conditions aforesaid, and further agreed to furnish defendants such further sums as might be necessary to feed and carry the stock said defendants proposed to buy through to the spring market; that in consideration of the mutual covenants, promises and agreement, as aforesaid, the defendants were led and induced to borrow the sums

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of money specified in said notes, and to execute the same; that had it not been for such promises and agreement on the part of the plaintiff bank defendants would not have borrowed said sums of money and executed said notes.

"Defendants further say that they took the money thus borrowed of plaintiff bank and invested the same in hogs according to their said agreement and understanding with plaintiff bank and otherwise carried out and executed all the terms and conditions of said contract on their part; that they had a splendid lot of hogs on hand which were at the time worth less than five cents per pound on the market, but said hogs were not fatted and ready for market, being merely stockers with splendid prospects of growth to large, thrifty, fatted hogs; that at the times last mentioned defendants could have purchased corn at sixty cents per bushel on which to feed and carry said hogs through the winter, but the plaintiff bank not only refused to furnish the further sums of money thus agreed upon for the purpose of feeding and carrying said stock through the winter, but at that time—it was the fall of the year—made demand on defendants for payment of the amount already borrowed as specified in the notes sued on herein.

"Defendants further say that by reason of the breach of the contract as aforesaid on the part of the plaintiff aforesaid, that is, the failure and refusal of plaintiff bank to furnish defendants money to carry said stock through the winter and by reason of their demand of payment of the amount already loaned to defendants as aforesaid contrary to the agreement and understanding, the defendants were obliged thus in the fall of the year while their hogs they had purchased and had on hand were unfatted and merely growing stockers, and while they were low on the market as aforesaid and while feed was yet cheap as aforesaid, to sell and dispose of said hogs in order to meet the

demands of the plaintiff bank for payment of said notes, which resulted in great loss and sacrifice to defendants; that had they been permitted to keep the said hogs until the following spring, and had they been furnished the money to buy feed in the fall while it was cheap, all of which had been agreed upon and contracted between plaintiff bank and these defendants, should have been done, the growth on said hogs and the increase of weight that would have resulted by keeping them until the following spring, together with the increase in price from the fall to the spring market of three cents to four cents per pound on hogs of the kind and character in question, would have netted to these defendants more than \$1000 over and above the amount they realized on said hogs at the time and under the circumstances under which they were forced to sell by plaintiff bank.

"Wherefore, defendants say that they have been damaged in the sum of fifteen hundred dollars, for which said sum they pray judgment against plaintiff and for costs of this action."

The court refused to vacate the default judgment, and the case is here on defendants' appeal.

It has been held from the earliest times in this State that the setting aside of a judgment by default is addressed to the sound discretion of the trial court, and that to justify a trial court in setting aside such judgment, the defendant must show (1) that he has good reason for the default, and (2) that he has a meritorious defense, and that both of these things must appear so clearly as to make it manifest that the refusal of the trial court was arbitrary. [Parks v. Coyne, 156 Mo. App. l. c. 391, 137 S. W. 335, and cases cited; Colter v. Luke, 129 Mo. App. l. c. 707, 108 S. W. 608.]

Concerning the reason for a default, the courts have been and will ever be very lenient in the case of illness. [Scott v. Smith, 133 Mo. l. c. 624, 34 S. W. 864;

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Martin v. Tobacco Co., 53 Mo. App. 655; Stout v. Lewis, 11 Mo. 438.]

But the bill of exceptions expressly shows that the trial court did not base its ruling on the ground that defendants' attorney had been in any way neglectful of their interests, but plainly states that the court based its refusal to permit defendants to file their answer on the ground that the matters and things set forth therein did not constitute a defense to plaintiff's action under the law. In this, we agree. [Bircher v. Payne, 7 Mo. 462; Atwood v. Lewis, 6 Mo. 392; Bridge v. Tiernan, 36 Mo. 439.] Parol evidence is not admissible to show that the maker of a note, which purports to be payable absolutely, only promised to pay on condition. [Jones v. Jeffries, 17 Mo. 577; Massmann v. Holscher, 49 Mo. l. c. 88, 89; Jones v. Shaw, 67 Mo. 667; Wislizenus v. O'Fallon, 91 Mo. 184, 3 S. W. 837; Kessler v. Clayes, 147 Mo. App. l. c. 98, 99, 125 S. W. 799.] These authorities are conclusive and appellants have nothing in their brief which in any way diminishes their force.

Even if defendants have a cause of action growing out of plaintiff's violation of its alleged agreement to furnish more money to defendants or not to sue on these notes when they became due, such cause of action is an independent one and is not a defense to the notes. The judgment on the notes decides nothing as to such claim, and the trial court was not bound to set aside the judgment in question in order to permit defendants to avail themselves of an independent claim not going to a defense on the notes. All concur.

**EMMA LEE LONG, Appellant, v. ELISHA LONG,
Respondent.**

Springfield Court of Appeals, May 5, 1913.

DIVORCE: Appeal: Evidence: Deference to Finding of Trial Court. While in a divorce proceeding the appellate court reviews the entire record, both the facts and the law, yet, where the evidence is in direct conflict, great deference is paid to the finding of the trial court who had the advantage of personal contact with the parties and their witnesses and was better prepared to judge their credibility and weigh their evidence. *Held*, that the finding for the defendant was not against the preponderance of the evidence.

Appeal from Jasper Circuit Court, Division Number Two.—*Hon. David E. Blair*, Judge.

AFFIRMED.

Shannon & Phelps for appellant.

(1) A wife is a competent witness to protests made by her to her husband against excessive sexual intercourse. *Maget v. Maget*, 85 Mo. App. 6. (2) Excessive sexual intercourse amounts to cruelty entitling a wife to a divorce when it impairs her health. *Maget v. Maget*, 85 Mo. App. 6; *Gardner v. Gardner*, 58 S. W. 342; *Mahew v. Mahew*, 23 Atl. 966; *Walsh v. Walsh*, 61 Mich. 554; *Melvin v. Melvin*, 42 Am. R. 605; *Cole v. Cole*, 23 Iowa, 440. (3) The mere presence of the husband when the wife commits a crime raises a presumption that the wife acts by constraint of the husband, and in the absence of any other evidence the wife must be held guiltless in law. *State v. Miller*, 162 Mo. 253.

J. D. Harris for respondent.

(1) The general rule is well established that the wife cannot testify to confidential communications

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occurring between herself and husband, in the absence of a third party. Schierstein v. Schierstein, 68 Mo. App. 205; King v. King, 42 Mo. App. 454; Brown v. Brown, 53 Mo. App. 453; Ayers v. Ayers, 28 Mo. App. 97. (2) The court permitted the wife to testify to the acts and conduct of the defendant in reference to sexual relations and alleged sexual demands, but properly refused to let her testify as to alleged conversations occurring between them. Ayers v. Ayers, 28 Mo. App. 97. (3) The exception to the rule of exclusion of privileged communications occurring between husband and wife, which plaintiff seeks to invoke, is not applicable to this case, because, if the court's ruling in this regard were error, the plaintiff is in no position to complain of it, for the reason plaintiff invited such error and a party cannot invite error, and then be heard to complain of it. Rourke v. Railroad, 221 Mo. 62; Smart v. Kansas City, 208 Mo. 204; Parker v. Street Railway, 140 Mo. App. 707. (2) Because the plaintiff did not save exceptions at the trial to the ruling of the court in that behalf. Huggins v. Jasper, 134 Mo. App. 5; Wycoff v. Hotel, 146 Mo. App. 554. (4) Where the spouse seeking the divorce is not an innocent party, the suit must fail. In the case at bar the plaintiff's own testimony, if it were believed, shows her to be a self-confessed, willful abortionist. Besides, the testimony of her own daughters shows that she was quarrelsome, fault-finding and over exacting in her behavior towards the defendant, and that she abandoned defendant without just cause or excuse. Miles v. Miles, 137 Mo. App. 38. (5) The burden rests upon the plaintiff in a suit for divorce to show, not only that she is injured by guilt of her spouse of an offense recognized by law as a ground for divorce, but that she is also innocent of breach of marital duty. To be entitled to divorce she must come into court with clean hands. Libbe v. Libbe, 157 Mo. App. 707. (6) In a divorce case, where the evi-

dence is conflicting, the findings of the trial court will not be disturbed on appeal, unless manifest error is made to appear. *Munchow v. Munchow*, 78 Mo. App. 99; *Nichols v. Nichols*, 39 Mo. App. 294; *King v. King*, 42 Mo. App. 454.

FARRINGTON, J.—This is a suit for divorce and alimony filed by Emma Lee Long against her husband, Elisha Long, in the circuit court of Jasper county. Unsuccessful there, she has perfected her appeal to this court, and the entire record is before us in the printed abstract.

In her petition, plaintiff sets forth the necessary and ordinary allegations of a petition for a divorce, and alleges that there were born of the marriage four children, ranging in age from eighteen to five years. Her charges are that her husband compelled her on frequent occasions, when she was pregnant, to submit to an abortion in order to destroy the foetus and thus remove the impediment that childbirth would interpose to the gratification of his sexual passion, and that he was brutal in his sexual demands and in his demands for her physical labor when in a pregnant condition or during the periods subsequent to eleven miscarriages which are alleged to have occurred; that he was jealous, and acted in such a way as to humiliate her in the presence of visitors at their home, called her vile names, accused her of stealing his money, and putting poison in his food, and that at one time he threatened to kill her as well as himself; and that he encouraged their daughters to associate with young men of bad repute and character.

Defendant in his answer admitted the marriage, but denied each and every other allegation of plaintiff's petition.

The plaintiff in her testimony detailed a story, which if true, would clearly entitle her to a divorce—and to the sympathy of all, as well. She swears that

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she had some five or six operations performed for the purpose of effecting abortions, and that numerous miscarriages also occurred caused by the condition in which she was compelled to live, and that she was required to submit to the abortions by her husband. She states with reasonable certainty the times when the several abortions were committed, and gives the names of the physicians who performed the operations, and also the dates when the different miscarriages occurred; and there is no doubt that she did have some ten or eleven miscarriages resulting from operations and her physical condition. She testifies of having been compelled to go to bed with her husband early one evening while company was at their home, and that soon after retiring she became so nervous owing to his demands and accusations against her that she either swooned or went into hysterics and became at least partly unconscious. That she was in this condition, the visitors who were at their home testified, but the reasons she gave for her condition are wholly uncorroborated and are denied by the defendant. She testified that defendant said he would kill her and himself, but this is uncorroborated and is denied by the defendant. It is in evidence that she left her home several times, and once, at least, for the purpose of procuring a divorce, but afterward returned. She swears that she was required to do household work and physical labor while in the nervous and weakened condition caused by the manner in which she lived and that defendant's demands in this respect were brutal and were such as to render her condition intolerable.

The defendant as a witness denied all of plaintiff's testimony, except that she did have a number of miscarriages; he stated that he at times took her to town for the purpose of seeing physicians, but that he had no knowledge of any abortions being committed.

The testimony of witnesses for both the plaintiff and the defendant is that plaintiff was of a very nerv-

ous disposition and subject to some kind of spells that at times would make her hysterical and unconscious; that the defendant, so far as all outward appearances revealed, was a good provider and a good man—a good, hard-working man, and a fair provider for his family—some of the witnesses saying he provided better than many of his neighbors who were in practically the same circumstances.

The daughters, aged eighteen and fifteen years, were called by the trial judge and examined, and they swore that their sympathy was with their father in this divorce proceeding. They said he was a good, kind, father; and they testified that they loved their mother as much as they did their father, and, together with the defendant, expressed the desire that the plaintiff return to the home.

The trial judge in this proceeding was required to find from the evidence which of the principal actors was disclosing the true status of this family. Owing to the serious charges and their nature, the testimony was necessarily confined to a great extent to the utterances of the husband and wife—for no one could know what their most intimate relations were as man and wife—and there was a square conflict, the one affirming and the other denying. The trial judge was therefore put to the task of looking to the testimony of other witnesses on both sides in an attempt to ascertain whether, on the matters concerning which third parties could testify, the husband or the wife was best corroborated. After reading all the testimony in this voluminous record, it seems to us, as it evidently did to the trial judge, to tend strongly to corroborate the husband. The only serious conflict of the testimony of the witnesses with that of the defendant is found where one of the physicians as a witness swears that defendant came with the plaintiff to his office, and this was denied by the defendant; however, this testimony of the physician is in connection with testimony of a

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most positive character on the part of the physician that the operation which he performed on this occasion was necessary in order to preserve the plaintiff's life, and that he did not know at the time whether or not she was pregnant, but that owing to her physical condition the operation was a necessity—all of which, of course, is no evidence that defendant took the plaintiff there for the purpose of having an abortion committed.

The evidence is irreconcilable. The conflict is such that a court could reasonably find either way. While it is true that in a divorce proceeding the appellate court reviews the entire record—the facts as well as the law—yet where the evidence is in direct conflict, great deference is paid to the finding of the trial judge who had the advantage of personal contact with the parties and their witnesses and was therefore better prepared to judge their credibility and weigh the evidence. [Wyrick v. Wyrick, 162 Mo. App. l. c. 732, 145 S. W. 144.] The case was orally argued by learned counsel for appellant, and we have with a care commensurate with the issue involved examined this record, only to be convinced of the wisdom of the ruling of the trial judge that the evidence fails to preponderate in favor of the plaintiff's version of her married life.

It was said in oral argument that reconciliation is impossible—that plaintiff will not return to the indignities suffered during twenty years of married life—that her physical condition is such that sexual intercourse will endanger her life. This view of the situation forces the thought that divorce, after all, is not *always* a panacea for marital ills. It merely removes the barrier to another venture upon matrimonial seas, a venture attended with danger to this plaintiff's life..

The judgment is affirmed. All concur.

WILLIAM KENDRICK, Respondent, v. MARION HARRIS, Appellant.

Springfield Court of Appeals, May 5, 1913.

1. **EVIDENCE: Demurrer To: When Sustained.** Where there is no evidence adduced by the plaintiff to support the allegations of his petition, a demurrer to the evidence should be sustained.
2. **INSTRUCTIONS: Evidence Not Supporting: Erroneous.** An instruction is erroneous which submits to the jury a theory not supported by the evidence.
3. **INSTRUCTIONS: Objections to Because of Insufficiency of Evidence: Inferences.** Where an issue has been submitted to a jury on proper instructions and complaint is made that there is no evidence sufficient to warrant its submission to the jury, all the facts which the evidence tends to establish or which may be reasonably inferred therefrom are taken as admitted and will be considered in the most favorable light to the plaintiff.
4. **NEGLIGENCE: Injury to Animals: Evidence: Sufficiency of.** An action for injuries sustained by plaintiff's horse, occasioned by defendant chasing a bull on horseback, which caused the horse to become frightened and run against a barbed wire fence; evidence examined and reviewed and held sufficient to warrant the trial court in submitting the case to the jury.

Appeal from Carter County Circuit Court.—*Hon. W. N. Evans, Judge.*

AFFIRMED.

J. L. Huett and E. P. Dorris for respondent.

(1) The court did not err in refusing defendant's demurrer to the evidence at the close of the evidence offered by plaintiff. All the facts which the evidence in the support of the issue tends to establish, or which may reasonably be inferred therefrom, are taken as admitted on demurrer and considered in the most favorable light to the plaintiff and he is entitled to every reasonable inference to be drawn therefrom, and where

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there is substantial evidence, however weak, upon which to base the verdict it will not be disturbed but should be affirmed by the appellate court. Davis v. Clark, 40 Mo. App. 515; Voegelis v. Marble & Granite Co., 56 Mo. App. 578; Torpey v. Railroad, 64 Mo. App. 382; Hueth v. Dohle, 76 Mo. App. 671; Hadley v. Orchard, 77 Mo. App. 141; Clark v. Shrimski, 77 Mo. App. 166; Steube v. Iron & Foundry Co., 85 Mo. App. 640; Tapley v. Herman, 95 Mo. App. 537; Knapp v. Hanley, 108 Mo. App. 353; Fields v. Railroad, 113 Mo. App. 642; Stevens v. Stevens, 132 Mo. App. 624; Kennedy v. Railroad, 70 Mo. 243; City of St. Louis v. Railroad, 114 Mo. 13; Baird v. Railroad, 146 Mo. 265; Charltons v. Railroad, 200 Mo. 413; Gordon v. Park, 202 Mo. 245; Von Trebra v. Gaslight Co., 209 Mo. 648; Kinley v. Railroad, 216 Mo. 145. (2) We respectfully submit that the evidence fully warranted the verdict for plaintiff, and in view of the long, continuous, uniform and approved rulings of our courts on this proposition, we cite a few cases on this well settled question. The creditability of witnesses and the weight to be given to evidence is for the determination of the trial court and jury, and that determination is conclusive on appeal. Gregory v. Chambers, 78 Mo. 294; Lalor v. McDonald's Admr., 44 Mo. App. 439; Polhans v. Railroad, 45 Mo. App. 153; Hurst v. Scammon, 63 Mo. App. 634; Seatelle v. Ins. Co., 92 Mo. App. 192; Golden v. Tyler, 180 Mo. 196; State v. Murphy, 46 Mo. 347; Gibson v. Railroad, 8 Mo. App. 488; Walker v. Owens, 25 Mo. App. 587; Herriman v. Railroad, 27 Mo. App. 435; Tower v. Pauley, 76 Mo. App. 387; Davis v. Millsap, 140 S. W. 751.

S. L. Clark and G. H. Yount for appellant.

(1) Appellant's demurrer to the evidence should have been sustained, for the reason that there was no

evidence adduced by plaintiff to support his contention that the injury to his horse was caused by appellant chasing a bull through his inclosure in a wild, careless, unnecessary, reckless and wilful manner as alleged in his complaint. Cogan v. Railroad, 101 Mo. App. 179; Miller v. Railroad, 134 S. W. (Mo. App.) 1045; Maynard v. Railroad, 137 S. W. (Mo. App.) 58; Dow v. Railroad, 116 Mo. App. 555. (2) Instruction numbered one, given on part of plaintiff was error for the reason that it submitted to the jury facts that were not in evidence. Sallee v. McMurray, 113 Mo. App. 253; Willis v. L. H. & Power Co., 111 Mo. App. 580; Chambers v. Railroad, 111 Mo. App. 609; Wallack v. Transit Co., 123 Mo. App. 160; Wagner v. Railroad, 118 Mo. App. 239; State ex rel. v. Dickman, 124 Mo. App. 653; Feddick v. St. Louis Car Co., 125 Mo. App. 24; Fisher v. Transit Co., 198 Mo. 562; Wellmeyer v. Transit Co., 198 Mo. 527. (3) Instruction numbered four offered by the defendant should have been given. Where the court refuses to eliminate from an instruction a theory of the case not supported by the evidence, its refusal constitutes reversible error. Houck v. Railroad, 116 Mo. App. 559.

STURGIS, J.—This case originated in a justice of the peace court of Carter county, Missouri. The statement of plaintiff's cause of action, as there filed, is as follows: "Plaintiff for his cause of action states that on the 25th day of June, 1911, he was the owner of a bay horse which he had in a pasture on the premises of this plaintiff in Johnson township, Carter county, Missouri, and that on said day, the defendant Marion Harris was driving a roughish bull by said pasture where said horse was, and that said bull jumped into said pasture, and that the defendant with his hired hand entered said premises on horseback and chased said bull in a wild, careless, unnecessary and reckless and wilful manner and hallowed and run their

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horses in a reckless and careless way, and thereby frightened and scared this plaintiff's said horse and thereby caused it to run into a barbed wire fence on said premises, and becoming entangled in said wire, thereby cutting large gashes across the breast and fore-legs and damaging the said horse, to this plaintiff's damage in the sum of one hundred dollars. Wherefore, plaintiff prays judgment for the sum of one hundred dollars (\$100), and costs of this suit."

It seems that the plaintiff recovered judgment in the justice's court, but it is not shown for how much. The defendant appealed and on a trial anew in the circuit court plaintiff recovered judgment for fifty dollars. The defendant brings the case here by appeal and his principal assignment of error is that the evidence was not sufficient to make a case for the jury, and that the court erred in not directing a judgment for defendant.

After the evidence was in the court gave to the jury the following instruction on behalf of the plaintiff: "The court instructs the jury that if you find and believe from all the facts and circumstances in evidence that the defendant recklessly and wilfully or unnecessarily drove or caused to be driven a bull through or over the enclosed premises of the plaintiff, and thereby caused the horse in question to become frightened and run into a barbed wire fence and thereby injured, then you should find the issues for the plaintiff and assess his damage at such sum as you may find he has sustained, if any, not exceeding, however, the sum of one hundred dollars."

At the instance of the defendant, the court gave this instruction; "The court instructs the jury that before plaintiff is entitled to recover in this case, it devolves upon him to establish by the evidence that the defendant entered upon the premises of the plaintiff and frightened the horse of plaintiff, which caused him to run into the barbed wire fence surrounding the

pasture in which said horse was grazing, thereby injuring said horse in the manner and to the extent described in the evidence, and unless he has so established such facts, your verdict should be for the defendant."

The defendant complains that the instruction above quoted as given for plaintiff is not a correct declaration of law, but his argument and citation of authorities show that his objection to the same is that there is no evidence to support the instruction; in other words, the objection to the instruction simply goes to the question of whether the evidence is sufficient to warrant a recovery. Appellant also complains that the court refused to give an instruction, numbered four, which need not be set out here in full, but an examination of which shows that it was virtually a demurrer to the evidence and asks the court to instruct the jury that there was no evidence adduced by plaintiff to sustain his allegation that defendant chased the bull in question, thereby frightening said horse belonging to plaintiff and thereby caused him to run into the barbed wire fence which occasioned the injury to the horse as shown by the evidence. It is therefore evident that appellant's whole contention is that there is no evidence adduced by plaintiff sufficient to support his claim that the injury to his horse was caused by appellant chasing a bull through his enclosure in a careless and unnecessary manner and thereby caused his horse to run into and be injured by the barbed wire fence.

We readily agree that appellant's proposition of law that a demurrer to the evidence should be sustained where there is no evidence adduced by plaintiff to support the allegations of his petition, and that the authorities cited by him, *Cogan v. Railroad*, 101 Mo. App. 179, 73 S. W. 738, and other cases, support this contention. We also agree that an instruction is erroneous which submits to the jury a theory not supported by the evidence; as is shown by *Houck v. Rail-*

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road, 116 Mo. App. 559, 92 S. W. 738; Sallee v. McMurray, 113 Mo. App. 253, 269, 88 S. W. 157, and other cases cited by appellant. We cannot agree, however, with appellant that there is no evidence to support the allegations of the petition and the instructions given by the court submitting the case to the jury. It is a well-known rule of law that in a case at law where an issue has been submitted to a jury on proper instruction and complaint is made that there is no evidence sufficient to warrant its submission to the jury, that all the facts which the evidence tends to establish or which may be reasonably inferred therefrom are taken as admitted and will be considered in the most favorable light to the plaintiff. [Davis v. Clark, 40 Mo. App. 515; Torpey v. Railroad, 64 Mo. App. 382; Gordon v. Park, 202 Mo. 236, 245, 100 S. W. 621; Von Trebra v. Gaslight Co., 209 Mo. 648, 658, 108 S. W. 559; Kinlen v. Railroad, 216 Mo. 145, 115 S. W. 523.]

The evidence in the case shows that the defendant and one Batham on horse back were driving a bull and some other cattle along a public road running past plaintiff's pasture where the plaintiff's horse in question was kept. This was on Sunday morning. One witness testified that he saw defendant and Batham riding up through the field with the plaintiff's horse following him, and that they said that he had run into a wire. Another witness said that defendant brought the horse to his house and got some medicine to put on him and that defendant told him that he brought him out of plaintiff's field and that the horse had been hurt by running into a wire. The plaintiff testified that he left the horse in the pasture that morning and was away from home during the day. He said he examined the fence when he came home and found the horse hurt and found that the bull got into the field about one-hundred and fifty yards from the upper end of the pasture and that the tracks showed that two men on horses went in at the gate and drove the bull out at the other

end of the field. He said that the tracks across the field showed that there were *three* horses and that the tracks in the ground made soft by a recent rain clearly showed that the horses were running. Two of the horses had traveled together and the other one had run along nearer the creek. Other witnesses testified that they heard persons hallooing at the cattle or horses down in the field. Another witness testified that she saw the defendant and Batham pass along the road driving this bull in the direction of plaintiff's horse and that, "they were running him pretty tight;" that the bull jumped the fence into another field about one-quarter of a mile from plaintiff's field and that they went in the direction of the plaintiff's field. It is not questioned but that the horse was badly cut by running into the barbed wire fence.

It is significant that the defendant, who must have known all about the transaction, did not testify or offer any evidence in rebuttal. The evidence and reasonable inferences to be drawn therefrom are sufficient to take the case to the jury. Finding no error in the record, the judgment will be and is affirmed.

All concur.

F. C. WALLOWER, Appellant, v. CITY OF WEBB CITY and H. C. SAHLMAN, Respondents.

Springfield Court of Appeals, May 5, 1913.

1. **APPEAL AND ERROR: Position Assumed in Trial Court: Not to be Changed in Appellate Court.** The plaintiff is bound by the position taken by him in the trial court, and having tried his case on the theory that the issue of contributory negligence was raised by the pleadings, he will not, on appeal, be heard to complain because instructions on that issue were given by the trial court.

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2. **CONTRIBUTORY NEGLIGENCE: An Affirmative Defense:** Must be Pleaded: Exception to the Rule. Contributory negligence is an affirmative defense and as a general rule must be alleged in order to be available. Yet, in cases where the plaintiff's own evidence tends to show that he was guilty of contributory negligence which defeats his right of recovery, the defendant may take advantage thereof, although the answer contains no plea of contributory negligence.
3. **NEGLIGENCE: Pleading: General Allegation: Sufficient Unless Objected to.** A general plea of negligence, whether in the petition or answer, is sufficient without specifying the particular acts, unless objected to by motion or otherwise, before trial.
4. **MUNICIPAL CORPORATIONS: Streets: Duty of One Using: Obstructions.** Where plaintiff's automobile, which he was at the time driving, was injured by coming in contact with a rope stretched from a building, under construction, across the street to a telephone pole, an instruction was not erroneous which told the jury that "every person using the streets of a city owes the duty to the city and to every other person using the streets, to exercise care to see and avoid obstructions in the street."
5. **NEGLIGENCE: Obstruction in Street: Notice of by City: When not Material.** Where a contractor and a city are jointly sued, the contractor for placing an obstruction across a street in a city which caused the injury complained of by the plaintiff and the city is sued for permitting the alleged negligent obstruction of the street, it being obvious from the finding of the jury that they considered either that there was no negligence proven on the part of the defendants or that the plaintiff was guilty of such contributory negligence as precluded his recovery, the question of the city having notice of the obstruction, actual or constructive, becomes of no consequence in the case.
6. **MUNICIPAL CORPORATIONS: Streets: Obstruction of: Negligence: Question for the Jury.** Where a contractor stretched a rope across the street so as to obstruct a small portion of it to persons in automobiles, such act was not necessarily, and as a matter of law, an act of negligence. It was a question for the jury under all the facts whether or not it was negligence.
7. **NEGLIGENCE: Obstructing Street: Evidence: Usual and Customary Manner of Doing Work.** Where the question whether or not a certain act is or is not negligence is a debatable one, it is not error to permit proof that such act was done in the usual and customary manner.

On Motion for Rehearing.

1. **MUNICIPAL CORPORATIONS: Obstructions in Street: Care Required of Traveler.** It is the duty of a traveler upon a public highway not only to use care to avoid known and expected obstructions and defects, but also to discover those which are unknown and unexpected and which are unlawfully there.
2. **INSTRUCTIONS: Complaint Against: When Groundless.** Plaintiff cannot complain of instructions based upon the same theory and which are the converse of those asked by himself.

Appeal from Jasper Circuit Court, Division Number One.—*Hon. Joseph D. Perkins*, Judge.

AFFIRMED.

Stonewall Pritchett, S. W. Bates and R. A. Pearson for respondents.

(1) If contributory negligence appears from plaintiff's own testimony, defendants may take advantage of it, regardless of whether they pleaded it. Kile v. Light & Power Co., 149 Mo. App. 359; Cane v. Wintersteen, 144 Mo. App. 5; Borden v. Sedalia, 161 Mo. App. 638; Benton v. Philadelphia, 198 Pa. St. 396, 48 Atl. 267. (2) A plea of negligence generally, is good if not timely objected to by motion, or demurrer. Harmon v. United Railways, 163 Mo. App. 449; Tuck v. Traction Co., 140 Mo. App. 335; Hitchings v. Maryville, 134 Mo. App. 712; Dougherty v. Railroad, 81 Mo. 325; Hurst v. City of Ashgrove, 96 Mo. 168; Gibbs v. Monett, 163 Mo. App. 112. (3) It is the duty of every person to use ordinary care to see and avoid obstructions in the street, whether he knew they were there or not. Wheat v. St. Louis, 179 Mo. 582; Ryan v. Kansas City, 232, Mo. 471. (4) A builder has a right to make a reasonable use of adjoining street. 28 Cyc. 464; Hestelbach v. City of St. Louis, 179 Mo. 505; Simon v. Atlanta, 67 Ga. 618, 44 Am. Rep. 739.

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H. W. Currey and George V. Farris for appellant.

(1) Contributory negligence must be affirmatively averred and proved. *Thompson v. Railroad*, 51 Mo. 190. And such plea must set out the facts constituting the negligence relied upon, as fully and with as much accuracy as is required of the plaintiff in stating a cause of action based on negligence. *Harrison v. Railroad*, 74 Mo. 365; *Waldheir v. Railroad*, 71 Mo. 516; *Nephler v. Woodward*, 200 Mo. 179; *Southern Railroad v. Brangon*, 39 So. 675. (2) The city has no right or power to grant permission to its co-defendant to stretch the rope across the street. *Galloso v. Skieston*, 124 Mo. App. 380; *Hatfield v. Straus*, 189 N. Y. 208; *McIlhiney v. Trenton*, 148 Mich. 380. (3) In all instances of grants of privileges in streets in municipalities the right of the public is superior. *Plattsmouth v. Tel. Co.*, 114 N. W. 588; *New York v. Knickerbocker*, 102 N. Y. Supp. 900; *Rothchilds v. Chicago*, 227 Ill. 205, 81 N. E. 407. (4) In traveling upon the public streets of a city no person is required to be vigilant to discover defects or obstructions in the streets which ought not to exist. *Thompson v. Bridgewater*, 7 Pick. (Mass.) 188; *Cox v. Turnpike Co.*, 33 Barb. 414; *Stephens v. City of Macon*, 83 Mo. 345; *Frost v. Waltham*, 12 Allen 85; 2 Dillon on Municipal Corp., 1007; *Phillips v. Taxi Service Co.*, 183 Fed. 689; *Dailey v. Maxwell*, 132 S. W. 351, 152 Mo. App. 415; *Miller v. Railroad*, 134 S. W. 1045; *Lyman v. Dale*, 136 S. W. 760; *Enstrom v. Neumoegn*, 126 N. Y. Supp. 660. (5) The driver of an automobile on the streets of a city is not required to anticipate or guard against anything that appearances would not, ordinarily, suggest to a prudent person. *Domke v. Gunning*, 114 Pac. 436; *Donovan v. Burnhard*, 94 N. E. 276, 208 Mass. 181; *Molin v. Wark*, Minn. 1911; *McGourty v. Demarco*, 85 N. E. 891, 200 Mass. 297. (6) The mere fact of driving a car on the streets of a city faster than the speed

specified by law is not, as to third persons at least, negligence. Delfs v. Dunshee, 122 N. W. 236. (7) That plaintiff did not drive upon the street at the point where the rope was highest is no evidence that he was negligent. Walker v. Kansas City, 99 Mo. 647. (8) Instructions must be based on the pleadings and an instruction, based on an act, as contributory negligence, not pleaded, is erroneous. Harrison v. Railroad, *supra*; De Donato v. Morrison, 160 Mo. 581.

STURGIS, J.—This is a suit for damage to plaintiff's automobile caused by same coming in violent contact with a rope stretched across Second street in Webb City, Missouri, while plaintiff was driving down that street. The defendant Sahlman was assisting in building a church on the south side of that street and stretched this rope from the top of a gin pole, used in raising heavy material, to a telegraph pole on the opposite side. The rope was so low near the north side of the street that it caught the top of the automobile in passing under it and demolished the same. The petition counts on the negligence of the defendant Sahlman in stretching this rope across the street in such manner as to be dangerous to persons traveling along this street in automobiles or other vehicles, and that the defendant city was negligent in permitting such negligent obstruction of this much traveled street. The defendants answered separately. The answer of the city consists of a general denial and this clause: "Further answering defendant states that if plaintiff's automobile was damaged at the time and place alleged in plaintiff's petition, such damage was caused by the carelessness and negligence of plaintiff in operating his said automobile." The answer of defendant Sahlman consists of a general denial and this clause; "And for further answer said defendant says that if plaintiff sustained the damages to his property as in his petition alleged, it was because of his own careless

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and negligent acts and omissions in and about the running of his automobile, and the wrongful, excessive and dangerous speed with which he was running the same."

It will be noticed that these answers do not directly at least charge that plaintiff's negligence *contributed* to his loss; and it is argued that they charge that such negligence was the *sole* cause of such loss.

The case was tried, at least so far as the introduction of evidence was concerned, on the theory that these answers set up the defense of contributory negligence, and at no time did plaintiff object to any evidence brought out on the cross-examination of his own witnesses or to the evidence offered by defendants tending to show contributory negligence on the part of plaintiff on the ground that no such issue was raised by the pleadings. After the evidence tending to show the negligence of defendants and the contributory negligence of plaintiff was all in, the court submitted the case on instructions, hereinafter mentioned, based on defendants' negligence on the one hand and plaintiff's contributory negligence on the other. The jury found for defendants and the principal error complained of by plaintiff is the giving of instructions for defendants submitting the question of plaintiff's contributory negligence.

The record merely shows that plaintiff objected and excepted to the court's giving each and all the instructions given for defendants. The specific objection now made is that no issue of contributory negligence is raised by the pleadings and that the instructions should not broaden the issue. [De Donato v. Morrison, 160 Mo. 581, 61 S. W. 641; Pryor v. Railroad, 85 Mo. App. 367; Mitchell v. Railroad, 108 Mo. App. 142, 151, 83 S. W. 289.] There is nothing in the record to show that plaintiff raised this specific objection to the instructions in the trial court. Having tried this case on the theory that the issue of contributory

negligence was raised by the pleadings, the plaintiff is bound by the position taken by him in the trial court. [Dahmer v. Street Railway, 136 Mo. App. 443, 449, 118 S. W. 496.]

For the purposes of this appeal it is sufficient to say that plaintiff's own evidence shows that the street where the accident occurred is down grade, and that he was traveling at the rate of ten or twelve miles per hour; that he had previous knowledge that the church was being erected at this place and that the street was being more or less obstructed by lumber and other material used in the building; that the rope in question was an inch and a quarter to an inch and a half in diameter; that he did not see the rope at all before it caught his machine, although it was a clear bright day and there was nothing to prevent his doing so. He said he did not know where he was looking at the time of the accident, and gave it as his own opinion that if he had been looking down the street in front of him that he would have probably seen the rope in time to have stopped the machine, which he says he could have done in the distance of the car length. Plaintiff also said that he knew of a city ordinance limiting the speed of automobiles to eight miles per hour. There was evidence of other witnesses, introduced, without objection, that plaintiff was traveling as fast as twenty to twenty-five miles per hour; that at and just before the time of the accident he was looking at the church and work being carried on there; and that if he had turned a little nearer the middle of the street he would have passed under this rope without the accident.

The instructions, number seven and eight, complained of, submit the question of plaintiff's contributory negligence in that plaintiff was traveling at an excessive rate of speed, and that "the plaintiff was inattentive and not looking in the direction in which he was traveling," and that "he failed to use reasonable care and ordinary diligence in driving his automobile

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to discover the danger and avoid the injury," and that such negligence on his part contributed to the injury to his car.

It is evident that plaintiff's objection that these instructions are erroneous in that they relate to an issue not raised by the pleadings is not well taken for this reason: Every ground of contributory negligence mentioned in the instructions is based on plaintiff's own evidence. The authorities all hold that while contributory negligence is an affirmative defense and as a general rule must be alleged in order to be available, yet, in cases where the plaintiff's own evidence shows or tends to show that he was guilty of contributory negligence which defeats his right of recovery, the defendant may take advantage thereof, although the answer contains no plea of such contributory negligence [Kile v. Light & Power Co., 149 Mo. App. 354, 359, 130 S. W. 89; Hudson v. Railroad, 101 Mo. 13, 30, 14 S. W. 15; Engleking v. Railroad, 187 Mo. 158, 164, 86 S. W. 89.]

Plaintiff might have successfully objected to the introduction of any evidence, other than that of himself, tending to show contributory negligence on the ground that no such issue was raised by the pleadings. It is too plain for argument, however, that if defendants are entitled to the instructions mentioned, based on plaintiff's own evidence, even in the absence of any plea of contributory negligence in the answer, the jury would necessarily consider all the evidence introduced in determining that question and no error can be predicated on the court's giving these instructions.

The reason for excepting plaintiff's own evidence and instructions based thereon, from the rule requiring contributory negligence to be pleaded, is doubtless based on the fact that contributory negligence is an affirmative defense and all affirmative defenses must be pleaded in order to give plaintiff an opportunity to be apprised of and prepare to meet the same. A plain-

tiff cannot be heard to say, however, that he did not know of and had no opportunity to prepare to refute his own evidence.

This view of the case relieves this court of the difficult problem of reconciling the decisions of the other Courts of Appeals on the question of whether the general averment of plaintiff's negligence in the answer of either defendant, without averring that such negligence *contributed* to the injury complained of, is sufficient to raise the question of contributory negligence. The case of Cain v. Wintersteen, 144 Mo. App. 1, 128 S. W. 274, is a ruling by the Kansas City Court, almost directly in point, that such general allegation that plaintiff's injuries were caused by his own negligence is not a sufficient plea of contributory negligence. [See also Ramp v. Railroad, 133 Mo. App. 700, 704, 114 S. W. 59; Allen v. Transit Co., 183 Mo. 411, 81 S. W. 1142.]

On the other hand the ruling of the St. Louis Court in Harmon v. Railroad, 163 Mo. App. 442, 143 S. W. 1114, is equally in point that such general allegation is sufficient.

All these rulings are based on the theory that a general and indefinite allegation as to negligence, whether in the petition or answer, has been allowed to stand without being attacked by motion or otherwise before trial; as on such attack the same would be held bad. [Harrison v. Railroad, 74 Mo. 364.] The same rule of particularity in setting up the facts constituting negligence apply to the petition and answer alike (Harrison v. Railroad, 74 Mo. 364, 369); and it is generally held that a general plea of negligence, whether in the petition or answer, is sufficient without specifying the particular acts, unless objected to by motion or otherwise before trial. [Schneider v. Railroad, 75 Mo. 295; Conrad v. De Montcourt, 138 Mo 311, 325, 39 S. W. 805; Borden v. Falk Co., 97 Mo. App. 566, 570, 71 S. W. 478.]

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We cannot assent to the proposition that plaintiff was under no obligation to use reasonable care to discover the danger and avoid the injury, and that the court erred in instructing the jury that "every person using the streets of a city owes the duty to the city and to every other person using the streets to exercise care to see and avoid obstructions in such streets." It is true that plaintiff was not required to anticipate and keep watch for this or any other particular obstruction in the street, but the jury has a right to infer, as proving contributory negligence, that if plaintiff had used that degree of watchfulness and caution demanded of every one driving an automobile along a much used and more or less obstructed street, that he would have discovered this particular obstruction and avoided this particular injury. [Wheat v. St. Louis, 179 Mo. 572, 582, 78 S. W. 790; Ryan v. Kansas City, 232 Mo. 471, 487, 134 S. W. 566, 985; Windle v. Southwest Missouri Railroad, 153 S. W. 282.]

The plaintiff says that no one would be required to keep watch for a lion or tiger (not of the "blind" variety however) on the streets of Webb City, as he could not reasonably anticipate such an animal there. That is true; but the exercise of the care and watchfulness required of him in reference to horses or vehicles or obstructions which are to be expected on such streets would most likely cause him to see and avoid running into a sleeping lion or blind tiger should such an animal by chance be found on the streets of that city.

Plaintiff also complains of certain instructions relative to the proof required in order to charge the defendant city with notice of the obstruction in its street. It is obvious that the jury found either that there was no negligence proved on the part of either defendants or that plaintiff was guilty of such contributory negligence as precluded his recovery. This question of the city having notice, actual or constructive,

of this obstruction was of no importance under either finding. If the jury found that there was no negligence of defendant Sahlman, then the city could have had no notice, actual or constructive, of such negligence; and if plaintiff was guilty of contributory negligence it would not matter whether the defendant city had or had not knowledge of Sahlman's negligence.

Complaint is also made that the court erred in permitting defendant Sahlman to testify that he was doing this work in the ordinary and approved manner in stretching the rope across the street in the manner shown by the evidence. The act of defendant Sahlman in stretching this rope across the street so as to obstruct a small part of it to persons in automobiles and without warning people of the danger, was not necessarily and as a matter of law an act of negligence, as the court instructed the jury it was. Whether it was or was not negligence was a question for the jury under all the facts. [Tuck v. Traction Co., 140 Mo. App. 335, 341, 124 S. W. 1079.] Where the question whether or not a certain act is or is not negligence is a debatable one, it is not error to permit proof that such act was done in the usual and customary manner. [21 Ency. Law (2 Ed.), 524; 29 Ency. Law (2 Ed.), 418; Knorpp v. Wagner, 195 Mo. 637, 659, 93 S. W. 961; Spencer v. Bruner, 126 Mo. App. 94, 102, 103 S. W. 578.]

We have carefully considered all the errors complained of by learned counsel for appellant and are convinced that plaintiff had a fair trial and that this case ought to be and is affirmed. It is so ordered.

Farrington, J., concurs. *Robertson, P. J.*, not sitting.

ON MOTION FOR REHEARING.

STURGIS, J.—This case illustrates the difficulty the courts have in keeping the length of their opinions

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within reasonable bounds—a thing greatly to be desired. The motion for rehearing in this case assigns twelve reasons therefor, though not complying with the rules of this or any of our appellate courts relative to such motions. The motion is accompanied by a brief of thirty-two closely type-written pages, with many citations of authorities from this and other States. If we do not discuss and rule on each and every one of these twelve reasons and discuss and distinguish all the cases now cited, there will still exist the same reason for saying that this court overlooked the points and that the decision is in conflict with all the cases now cited as there is for so alleging as to the original opinion.

We have, however, given due consideration to this motion and brief with the view of determining, as we must, whether the original opinion correctly declared the law and decided the case on the facts presented. We think it did. The motion criticises the opinion for holding that plaintiff was negligent if he failed to travel at a lawful rate of speed and use ordinary care to discover and avoid the rope stretched across the street so low near one side of the same as to strike his automobile. If we understand the point made, it is that defendant Sahlman cannot invoke the rule of plaintiff's contributory negligence as defeating his action for the reason that defendant is not within the class of persons who are to be protected by the speed law or ordinance in that he was doing an *unlawful* act in stretching the rope across the street; and as the rope was there *unlawfully* plaintiff was not bound to travel at a lawful rate of speed or use other ordinary care to discover it. Plaintiff says that his duty is limited to avoiding this rope after actually discovering it. We think, however, that the reading of what our Supreme Court said in *Woodson v. Railroad* 224 Mo. 685, 123 S. W. 820, and the cases there cited,

as to the duty of a traveler upon a public highway, not only to use care to avoid known and expected obstructions and defects, but also to discover those which are unknown, unexpected and *unlawfully* there, will convince anyone of plaintiff's error. Nor do we think, if that makes any difference, that said defendant's act in stretching the rope across the street in aid of his work in erecting a building adjacent thereto was an unlawful act, regardless of the manner or purpose for which it was done. We think there is nothing more than negligence on such defendant's part and that his negligence, if any, in so doing was merely in stretching the rope so low near the north side of the street as to interfere with the lawful travel thereon.

We ruled, without serious thought of its being questioned, that the plaintiff, having tried the case on the theory that the issue of contributory negligence was raised by the answers was bound by that position in the appellate court, and we cited only one case supporting it. The plaintiff now contends that "a party may try his case on a theory entirely outside of the issues and then raise the question in the appellate court that the instructions given are not within the issues," and this too, when the record shows, as we have pointed out, that no objection on this ground was made to the evidence showing contributory negligence, although plaintiff testified himself as to that matter and numerous witnesses were examined and cross-examined along this line, and no specific objection was made to the instructions or anywhere else in the record before it reached this court calling the court's attention to this error. We now cite these authorities as supporting our position: Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 307, 91 S. W. 460; Stewart v. Outhwaite, 141 Mo. 562, 572, 44 S. W. 326; Heffernan v. Ragsdale, 199 Mo. 375, 382, 97 S. W. 890; Hales v. Raines, 162 Mo. App. 46, 63, 141 S. W. 917; Tassig v. Railroad, 186 Mo. 269, 284, 85 S. W. 378.

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Besides this, we call attention to the fact that plaintiff's petition alleges that while traveling in his automobile he was "in the exercise of reasonable and proper care on his part" and that "he was running his automobile at a lawful and reasonable rate of speed." This was denied by the answer and the general allegations of contributory negligence made as stated. Besides this, no less than three of plaintiff's instructions predicated his right to recover on condition that he was traveling along the street in his automobile "at a lawful rate of speed" and was "without fault or negligence on his part" in running into said rope. The plaintiff cannot complain of instructions based on the same theory and which are the converse of those asked by himself. [Huss v. Bakery Co., 210 Mo. 44, 51 and 71, 108 S. W. 63.]

The motion for rehearing is overruled. *Farrington, J.*, concurs. *Robertson, P. J.*, not sitting.

JAMES A. CROW and JAMES WORLEY, Appellants, v. WILLIAM ABERNATHY, Respondent.

Springfield Court of Appeals, May 5, 1913.

1. **APPEAL AND ERROR: Refusal of Instructions: Conflicting Testimony: Finding of Trial Court Sustained.** Where the instructions refused by the trial court declared or assumed facts concerning which there was conflicting testimony, the appellate court will not disturb the ruling of the trial court, as the finding of the trial court on conflicting evidence is conclusive on the appellate court.
2. **SALES: Delivery of Possession: Evidence Reviewed.** Suit for alleged conversion of lumber. One R conveyed to plaintiff by warranty deed certain land on which said lumber had been piled at various places, but the deed was not recorded for a considerable length of time and R remained in possession of the land and lumber. Defendant claims to have bought the lumber from R and R so testified. Plaintiff contends that the title to the lumber passed to him along with the title to the land

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- under the warranty deed. The evidence is examined and reviewed and it is held that the question as to whether or not the lumber in controversy was a part of the real estate is a mixed question of law and fact; and the trial court having found that the lumber was not a part of the real estate, but was personal property sold by R to plaintiffs, and yet having rendered judgment for defendant, the appellate court must conclude that the trial court found that there was no such change of possession as would relieve the transaction between plaintiffs and R from the provisions of Sec. 2887, R. S. 1909, which provides that a sale of goods and chattels shall be void as against subsequent bona fide purchasers unless there is a delivery within a reasonable time; and that defendant purchased the lumber from R and acquired the title thereto as against the plaintiffs.
3. **SALES: Consideration: Sufficiency of.** Where it is agreed that a purchaser shall assume a certain indebtedness of the seller to a third party and third party is released, such agreement constitutes a sufficient consideration for the sale.

Appeal from Butler Circuit Court.—*Hon. J. C. Sheppard*, Judge.

AFFIRMED.

Ernest A. Green for appellant.

(1) The court erred, as a matter of law, in refusing to give plaintiffs' declaration of law No. 5; the agreement had between W. D. Roberts and the defendant Abernathy, with reference to this lumber, did not in law constitute a sale of said lumber and, therefore, the defendant never did acquire title to the lumber in controversy. *Johnson, etc., Co., v. Bank*, 116 Mo. 558; *Thompson & Co. v. Massey*, 76 Mo. App. 197; *Greer v. Bank*, 128 Mo. 559; *Whedon v. Ames*, 28 Mo. App. 243. (2) The court erred in its finding for the defendant, and in refusing to give plaintiffs' declaration of law No. 4; under the law the plaintiffs are not barred from maintaining this action by reason of the provisions of Sec. 2887, R. S. 1909, inasmuch as the possession of the real estate on which lumber was located, by the plaintiffs, was a sufficient posses-

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sion of the lumber sold, to constitute the possession required under the provisions of Sec. 2887, R. S. 1909, so as to bar the subsequent purchaser of the said lumber. Sec. 2887, R. S. 1909; Hawkins v. Brick Co., 63 Mo. App. 64; Simmons, etc. Co. v. Pfeil, 35 Mo. App. 256; Dillin v. Kincaid, 70 Mo. App. 670; Kendall, etc. v. Bain, 46 Mo. App. 581; State ex rel. v. Hall, 45 Mo. App. 298; Watchell v. Ewing, 82 Mo. App. 594. (3) The court erred in refusing to give plaintiffs' declaration of law No. 2; as a matter of law, the lumber in controversy in this case was conveyed to the plaintiffs, and they became the owners thereof under and by virtue of the general warranty deed offered in evidence, from W. D. Roberts and wife, as grantors, to the plaintiffs, as grantees; said lumber being real property and the title thereto passing under and by virtue of said deed. Rogers v. Crow, 40 Mo. 91; McIlvaine v. Harris, 20 Mo. 457; Cohen v. Kyler, 27 Mo. 122; Life Ins. Co. v. Tillery, 152 Mo. 421.

Abington & Phillips for respondent.

(1) If there was any agreement between Roberts and Crow as testified to by the latter that the lumber in controversy should go to Worley and Crow with the land, such prior oral agreement was merged in, and obliterated by the subsequent written contract; that is to say, the deed conveying the real estate. Parsons v. Kelso, 141 Mo. App. 369; Kriling v. Cramer, 152 Mo. App. 431; Birdsall v. Coon, 157 Mo. App. 439; Berberet v. Meyers, 144 S. W. 824. (2) The lumber in controversy lying as it did scattered about over the Roberts farm was personal property and did not pass to appellants by the deed conveying the real estate, and hence the court erred in appellant's favor in giving declaration of law number 3. 13 Cyc. 641-2. (3) There was no sale of the lumber from Roberts to Crow and Worley. There was no agreement as to

amount or kind of lumber and no agreement as to price; and hence, no sale. Tiffany on Sales, p. 1; Greer v. Bank, 128 Mo. 201; Whedon v. Ames, 28 Mo. App. 243. (4) The transfer of the lumber from Roberts to Abernathy constituted a valid and binding sale of the property. Hackley v. Cooksey, 35 Mo. 398; 35 Cyc. 47-8. (5) Roberts was in possession of the lumber at the time of the sale to respondent and if the lumber had been previously sold to appellants that sale was void as to respondent. R. S. 1899, sec. 3410.

ROBERTSON, P. J.—By warranty deed dated October 28, 1910, one Roberts and his wife conveyed to plaintiffs one hundred and sixty acres of farm land in Butler county for the expressed consideration of \$4500 and \$2600 in incumbrances to be paid by the said plaintiffs.

At and prior to the time this deed was executed the grantor had lumber at various places on his farm; some of it under cotton that was piled up out in the field, some piled in or about a hay shed in a field where baled hay was stacked, and some scattered around at various other places on the farm.

One of the plaintiffs says that when he was negotiating with Roberts for the purchase of the farm that he said to him that it was his (plaintiff's) understanding that this lumber should go with the farm, to which Roberts assented. Roberts says that he had no such conversation but he claims to have sold the lumber to the defendant, and the defendant maintains his defense on the theory of such purchase. The plaintiffs did not record the deed conveying the land to them for some time after the sale was made and there is testimony tending to prove that the former owner, Roberts, remained in apparent possession of both the land and lumber.

Soon after the land was purchased by plaintiffs the defendant hauled some of the lumber off of the

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farm to his own place of residence, about one-half of a mile therefrom, and claims to have taken none of it that was about the hay shed or the cotton. The defendant, according to his testimony and the testimony of Roberts and a merchant, purchased the lumber from Roberts and paid for it by having the merchant, to whom Roberts was indebted, agree to credit Roberts and charge defendant for the purchase price thereof. The credit and charge was not actually made on the books of the merchant but the agreements were such between these parties as would necessarily relieve Roberts from his obligation to the merchant and bind the defendant to pay the merchant, thus constituting a sufficient consideration for a sale by Roberts to the defendant.

As soon as one of the plaintiffs ascertained that the defendant had hauled the lumber away, he had a conversation over the telephone with defendant about it, which he relates as follows:

"Q. What did he say? A. He said I could have the lumber if I would go and haul it back.

"Q. Said you could have the lumber if you would go and haul it back? A. I told him I didn't haul it away, didn't intend to haul it back.

"Q. Did he refuse to pay for it? A. Yes, sir."

And thereupon this suit, in which plaintiffs seek to recover for the alleged conversion of the lumber, was instituted in a justice of the peace court on December 5, 1910, alleging the value of the lumber to be \$32.05. Plaintiffs lost in the justice's court, they appealed to and lost in the circuit court, and have appealed to this court, and now present to us for review a record consisting of 114 printed pages; all of which could have been avoided and compromised by the plaintiffs' hauling the lumber involved, 227 pieces, back to their farm, a distance of only half a mile.

At the close of all of the testimony, the plaintiffs requested several declarations in which the court was

asked to declare the law to be (1) that under all of the evidence the finding and judgment of the court should be for the plaintiffs; (2) that the lumber in controversy was conveyed to plaintiffs and that they became the owners thereof under and by virtue of a warranty deed from Roberts to the plaintiffs and that said lumber being real property the title thereto passed under and by virtue of said deed; (4) that the plaintiffs are not barred from maintaining their action by reason of the provision of section 2887, Revised Statutes 1909, inasmuch as the possession of the real estate on which the lumber was located by plaintiffs was a sufficient possession of the lumber sold to constitute the possession required under the provisions of said section so as to bar the subsequent purchaser of the lumber; and (5) that the agreement between Roberts and the defendant did not in law constitute a sale of the lumber and that therefore the defendant never did acquire title to the lumber from Roberts. All of which the court refused.

The plaintiffs, however, asked and were given what is termed declaration of law No. 3, as follows: "The court declares the law to be, that under the testimony in case, that the lumber in controversy in this case was sold as personal property by W. D. Roberts to the plaintiffs, on October 28, 1910."

Thereupon the court rendered and entered its judgment for the defendant and the plaintiffs have appealed to this court.

All of these questions upon which the appellants requested and were refused declarations of law were those which declared or assumed facts upon which there was conflicting testimony and therefore upon which no question can now be raised as the findings of the court thereon are conclusive upon us.

The question as to whether or not the lumber in controversy was a part of the real estate is necessarily in this case a mixed question of law and fact. It is,

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however, apparent from the so-called declaration of law numbered three that the court found that the lumber was not a part of the real estate but was personal property and was sold by Roberts to the plaintiffs. Accepting this as the finding of the court, we must then conclude that the court found that there was no such change of possession as would relieve the transaction between the plaintiffs and Roberts from the provisions of section 2887, Revised Statutes 1909, that the defendant purchased the lumber from Roberts and acquired the title thereto as against the plaintiffs; and, as in reaching this conclusion, the court had sufficient testimony on which to base it, we are unable to disturb the finding in that regard. We are of the opinion that there was no error committed in the trial of this case and that we are not justified in setting aside the finding of the trial judge. The judgment is affirmed. All concur.

U. W. SULLIVAN, Appellant, v. J. E. KIRKPATRICK, Respondent.

Springfield Court of Appeals, May 5, 1913.

1. **JUDGMENT: Should be Just: Relief Afforded by Equity.** A judgment should never be permitted to defeat justice, and any fact which clearly proves it to be against conscience to execute a judgment and of which the injured party could not avail himself in a court of law, will justify relief in equity.
2. **ROADWAY: Establishment by County Court: Failure to Open in Specified Time: Excuse for.** Defendant was ordered by the county court to open a private roadway across his premises. Plaintiff seeks to recover penalty provided for in Sec. 10454, R. S. 1909, because of the alleged failure of the defendant to open the roadway within the specified time. The evidence is examined and reviewed and held to warrant the trial court in finding that the defendant was honestly mistaken in believing that the time had not expired within which he was required to open the roadway and that the misunderstanding concerning the time was not the fault of the defendant and that a penalty should not be inflicted upon him for the default.

Appeal from Wright Circuit Court.—*Hon. C. H. Skinker*, Judge.

AFFIRMED.

F. M. Mansfield, E. H. Farnsworth and Lamar, Lamar & Lamar for appellant.

(1) The records of the county court relating to the establishment of the road are regular and in due form in all respects. R. S. 1909, sec. 10447-10453; *Fitzmaurice v. Turney*, 214 Mo. 630. (2) Where the record is silent as to jurisdictional recitals the proper antecedent steps will be presumed. *Hadley v. Bernero*, 103 Mo. App. 549; *State v. Batey*, 166 Mo. 561. (3) Defendant being in court was chargeable with notice of the judgment and all its recitals and of the time in which he was required to vacate the land condemned for the road. A party before a court is chargeable with notice of all subsequent steps taken in the case down to and including the judgment although he does not in fact appear and has no actual knowledge thereof. 29 Cyc. 116-b; 23 Cyc. 856; *McCormick v. Stevens*, 239. (4) The defendant having pleaded that the record of the county court was wrong, and the court overruling the plaintiff's motion to strike out such answer, the whole controversy in the lower court centered around the question as to the correctness of this record, and as to whether or not defendant could contradict the record by oral testimony. The records and judgments of a court impart absolute verity, are in conclusive and exclusive evidence of what was the judgment actually rendered by the court, and parol evidence is inadmissible to contradict, vary, or enlarge them. They are conclusive evidence of the facts therein recited between the parties thereto. 17 Cyc. 500-iv; 17 Cyc. 571-b; 23 Cyc. 855; *Freeman on Judgments* (3 Ed.), sec. 134, p. 143; *Freeman on Judgments* (3

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Ed.), sec. 76, p. 275; Black on Judgments (Ed. 1891), sec. 245, 273, 625, 626; Mobley v. Nave, 67 Mo. 546; Cook v. Penrod, 128 Mo. App. 136; Montgomery v. Farley, 5 Mo. 233; Maupin v. Franklin Co., 67 Mo. 327; Davidson v. Real Estate Co., 226 Mo. 29; Cooksey v. Railroad, 74 Mo. 477; Milan v. Pemberton, 12 Mo. 588; Lamonthe v. Lippott, 40 Mo. 142. (5) The above is also true of the records of a county court. They possess the same verity and are absolutely conclusive of the recitals therein, and cannot be contradicted, explained, enlarged, or modified by parol evidence. Riley v. Petis Co., 96 Mo. 318; County of Johnson v. Wood, 84 Mo. 142; Maupin v. Franklin, 67 Mo. 327; Dennison v. St. Louis County, 33 Mo. 168. (6) Statements of a judge outside of his court is not evidence of the actions of the court as a court, nor can evidence of such statements be recited to prove what the court did. Decker v. Deimer, 229 Mo. 322. (7) Courts are reluctant to disturb judgments, and the party asking such relief must be without fault or negligence. Black on Judgments, 365-367-375-387; 23 Cyc. 980-b; Renfrow v. Renfrow, 54 Mo. App. 429; Mesker v. Cornwell, 145 Mo. App. 650; Cantwell v. Johnson, 236 Mo. 601. (8) If it be held that in this action defendant may by answer file a bill in equity seeking relief from the judgment as entered, and that his answer herein is sufficient for that purpose, then it converts the proceeding into an action in equity, and the appellate court will examine and review the evidence and determine the weight and sufficiency thereof for itself, and render, or direct the lower court to render, such judgment as may be proper under the evidence. McCullum v. Broughton, 132 Mo. 621; Franklinbourg Appellate Practice, p. 163; Lose v. Borum, 19 Mo. App. 359; Shelton v. Franklin, 224 Mo. 368; Troll v. Spencer, 238 Mo. 93; Waddington v. Lane, 202 Mo. 415; Benne v. Schnecker, 100 Mo. 257. (9) In an action in equity to vacate a judgment, or enjoin its enforce-

ment, all presumptions are in favor of the validity of the judgment, and the burden of proof rests on the plaintiff, or when raised by equitable answer upon the defendant, and he must show himself entitled to the relief by evidence, clear, satisfactory and convincing or the bill will be dismissed. 23 Cyc. 1049, and cases cited; Huntington v. Crouther, 33 Ore. 408, 72 Am. St. Rep. 726; Engler v. Knoblaugh, 131 Mo. App. 495.

Jackson & Jackson and *Perry T. Allen* for respondent.

(1) Appellant's cause of action is based upon what he claims to be the record of the judgment of the county court which record the appellant's evidence shows to have been mutilated, changed, erased, and interlined. Appellant insists that that respondent cannot impugn the verity of the record in this action. Respondent contends that this contention is not true, that the verity of the record is directly in issue, that respondent's answer directly attacks the same, and that the records do not impart absolute verity. When in equity a clear case of fraud, accident or mistake is made out. Engler v. Knoblaugh, 131 Mo. App. 481; Davidson v. Hough, 165 Mo. 561; Capitain v. Trust Co., 240 Mo. 484. (2) The answer of respondent pleads that the order and judgment sued on is false, untrue and spurious and is not the true order and judgment of the county court. That the entering of record of the said false and spurious judgment was due to the act of one of the attorneys of the appellant in preparing a false form together with the mistake and oversight of the clerk in spreading the same on record and was no fault or negligence of the respondent. The respondent being injured by an unforeseen occurrence not due to his own negligence is entitled to relief therefrom. Engler v. Knoblaugh, *supra*; Smith's Equity, 14 Ed. 44; Story's Equity, 13 Ed. par. 78. (3) Courts

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of equity will relieve against judgments due to fraud, accident or mistake in all cases where the facts in evidence clearly prove it to be against conscience to execute the judgment and of which the injured party could not have availed himself at law. Bassett v. Henry, 34 Mo. App. 548; Wilhite v. Terry, 66 Mo. App. 454; David v. Staple, 45 Mo. 567; George v. Tutt, 36 Mo. 141. (4) Appellant's action being for the recovery of a penalty his rights in the premises must be strictly construed. The law does not favor penalties and it is elementary that in actions for the recovery of penalties the claimant must prove all the facts alleged and must allege and prove all the facts upon which the law predicates a right to recover. Statutes imposing penalties are strictly construed. State v. Wheeler and Adams, 101 Mo. App. 468; Dunkin v. Ins. Co., 63 Mo. App. 257; St. Joseph v. Forsce, 115 Mo. App. 510; Kingston v. Newall, 135 Mo. App. 385; Snow v. Boss, 174 Mo. 149. (5) The law abhors forfeitures and courts will indulge in no presumptions to aid them. King v. Life & Annuity Co., 133 Mo. App. 612; Watson v. Gross, 112 Mo. App. 615.

ROBERTSON, P. J.—Plaintiff instituted this suit in the circuit court alleging in his petition that the county court of Wright county by appropriate proceedings, in which he was petitioner, at its November term, 1911, ordered a private roadway to be opened up across the premises of the defendant before the 15th day of November, 1911, pursuant to the provisions of section 10447, *et seq.*, and that the defendant failed from said 15th day of November, 1911, until the 17th day of January, 1912, to open the road, and sought to recover the penalty provided for in section 10454.

To this petition the defendant filed his answer attacking the proceedings leading up to the final order and alleging that the order in fact made by the court gave the defendant until the 15th day of April, 1912,

in which to open up said road, and alleging that by reason of what transpired in court on the day the order was made that he was led to believe that he had until that date in which to open said road.

We deem it unnecessary to go into the details of the pleadings as they are sufficiently broad to cover the facts developed at the trial and pass over all the alleged errors in the proceedings leading up to the time the final order for the opening of the road was made and assume for the purposes of this opinion that there were no irregularities prior to that date.

The trial of the case was had to the court and the judgment, which was for the defendant, recites that a jury was waived by both parties. The plaintiff, after an unsuccessful motion for a new trial, has brought the case to this court.

The testimony discloses that on November 7, 1911, the petition of the plaintiff for the opening of the road was ready for final determination and that said petitioner's attorney was present in the court room while the court was in session and was advised that the road would be ordered opened and judgment entered therefor accordingly. The plaintiff's attorney was given the privilege of preparing the order. It appears that then no time was fixed in which the road should be opened, but after the petitioner's attorney left the court the attorney for the defendant appeared before the court then in session and called the court's attention to section 10453, requiring the court in its judgment to specify the time when possession was to be given by the owner, and that thereupon the court announced to the defendant's attorney that defendant would be given five months from that time. Said attorney then notified the defendant of the action of the court and the defendant testified that one of the judges of the court afterwards upon the street during that day told him he had been given five months in which to open the road. This the judge does not deny but

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says that if he ever said anything to defendant about the time for opening the road he does not remember it.

The county clerk and his deputy testified that the court announced to the attorney for defendant that the defendant should have five months. The judges in testifying as to what took place do not deny the announcement which the attorney for the defendant, the clerk and the deputy clerk state was made, but simply say that they do not remember that such a statement was made.

A few days after this business was transacted the court adjourned and was again in session in January of the following year. No minute was made by the clerk at the time of the court's action relative to this judgment.

Shortly after the adjournment the attorney for the petitioner took the order, or judgment, which he had prepared, to the clerk who hung it up on his files until it should be reached for recording in the regular order of his business. When the clerk reached this judgment and was spreading it upon the records he discovered for the first time that it gave the defendant only until November 15, 1911, in which to open the road. He called the attention of the attorney for the defendant thereto and thereupon that attorney called the clerk's attention to the fact that he had requested of the clerk that he be permitted to examine the order before it was placed on record and the clerk said he had forgotten it but would change the order in accordance with the announcement of the court. This the clerk did and the order was actually entered giving the defendant until April 15, 1912, in which to open the road, but when the court convened in January, 1912, they ordered the record restored to read as the attorney for the plaintiff had prepared it.

The attorney for the defendant testified that it was about two weeks after the adjournment of the No-

vember session of court before he heard of the way the order was prepared by the plaintiff's attorney and submitted to the clerk, and the defendant himself testified that it was a month or six weeks before he knew anything different from what the judge of the court and his attorney had advised him was the time fixed by the court for opening the road.

The plaintiff's attorney testified that he met the attorney for the defendant on the street when this matter was pending and that defendant's attorney asked him what petitioner was going to do about the award of damages and that he told the defendant's attorney that under the law he could not do anything. Then defendant's attorney asked him how long they were going to give defendant to get out and plaintiff's attorney said they (meaning defendant) did not need any time as he understood it would not take a day to do the work of opening the road. If this conversation took place before the order was prepared by the plaintiff's attorney there was no intimation given as to what the time would be; and if the conversation was after plaintiff's attorney had prepared the order, no information was given by him as to what date he had placed in the order.

The facts clearly disclose beyond controversy that the defendant was led to believe, and the order was so entered, that he had until in April, 1912, to open the road and that he did not ascertain that there was any contention that the facts were otherwise until long after the time fixed in the order prepared by plaintiff's attorney had expired.

Even conceding for the purposes of this opinion that the order as finally recognized by the court should be considered the judgment in these proceedings, we do not understand that it should carry with it such verity, sanctity or conclusiveness as that it cannot, under any circumstances, be contradicted, explained, enlarged or modified on evidence which discloses that a rank in-

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justice would be inflicted upon a party thereto if it were enforced as written. A judgment should not, in our opinion, be made an instrument to defeat the very object it is intended to accomplish, that is, justice. It has been said that any fact which clearly proves it to be against conscience to execute a judgment and of which the injured party could not avail himself in a court of law, will justify relief in equity. [Wilhite v. Ferry, 66 Mo. App. 453, 459; Bassett v. Henry, 34 Mo. App. 548, 556.]

An extensive review of the authorities applicable to this case is found in the opinion in the case of Engler v. Knoblaugh, 131 Mo. App. 481, 489, 110 S. W. 16.

If the defendant in this case was not acting in good faith or was not misled, the testimony offered at the trial was insufficient to convince the trial court of that fact and is not sufficient to lead us to believe the trial court was wrong in its finding and we assume, as did the trial court, that the defendant was led to honestly believe that he had until April in which to open the road, and that neither he nor his attorney knew differently until after the time in which the plaintiff claimed he was to open the road had expired. We do not believe it would be just to inflict a penalty upon the defendant for a default which was in no manner brought about by any fault of his.

There are a number of features of this case suggested in the brief of appellant as, for instance, the question of the right of defendant to interpose an equitable defense, and the duty of this court, in the event that the defense is treated as equitable, to review the evidence; but what is said above in this opinion and in the decisions above cited sufficiently covers these points and makes it improper for this court to extend its opinion further.

The judgment of the circuit court is affirmed. All concur.

R. W. HOUSE et al., Appellants, v. M. B. CLARKE et al., Respondents.

Springfield Court of Appeals, May 5, 1913.

COURTS: Appellate Jurisdiction: In Supreme Court When Title to Real Estate Is Involved. An action to redeem certain land from a sale under a deed of trust, is within the appellate jurisdiction of the Supreme Court and not of the Court of Appeals, since the title to real estate is involved within the meaning of Sec. 12, Art. 6, of the Constitution.

Appeal from Howell Circuit Court.—*Hon. W. N. Evans*, Judge.

TRANSFERRED TO THE SUPREME COURT.

J. N. Burroughs for appellants.

(1) The cashier of a bank cannot act as trustee and foreclose the equity of redemption. *Thacker v. Tracy*, 8 Mo. App. 315. (2) Nor can the president of a bank act as trustee and by foreclosure proceedings destroy the right of the maker to redeem. The law will not permit the officer of a bank to act as trustee in any case wherein the bank is creditor and the maker of the deed is the debtor. *Landrum v. Bank*, 63 Mo. 48. (3) The general rule is that a trustee cannot purchase at his own sale. If he does, the equity of redemption remains. *Geraldin v. Howard*, 102 Mo. 40. (4) A subsequent mortgagee may redeem upon application made in due time. *Mullanphy v. Simpson*, 3 Mo. 492. (5) If a mortgagee purchase at his own sale, it leaves the right of the mortgagor to redeem unforeclosed. *Moore v. Ryan*, 31 Mo. App. 474; *McNees v. Swaney*, 50 Mo. 388; *Gaines, v. Allen*, 58 Mo. 537.

House v. Clarke.

Green, Wayland & Green for respondents.

(1) Misfortune is no ground for redemption. *Van Meter v. Darrah*, 115 Mo. 156; *Meyer v. Kuechler*, 10 Mo. App. 371; *Bevin v. Powell*, 11 Mo. App. 216; *Lipscomb v. Ins. Co.*, 138 Mo. 24. (2) Where the deed of trust is given to a bank to secure a loan, the president being the trustee—the bank purchased under the sale and the sale is not void, but will authorize a redemption by pursuing the proper steps. *Landrum v. Bank*, 63 Mo. 48. (3) At sale under judgment of foreclosure, mortgagor cannot redeem, even though property be purchased by *cestui que trust*. *Rumsey v. Railroad*, 144 Mo. 175; *Rumsey v. Railroad*, 144 Mo. 191. (4) When sale is fairly conducted and property is not purchased by *cestui que trust* or his assignee, no right to redeem exists. *Keith v. Browning*, 139 Mo. 190. (5) When the property is purchased by *cestui que trust* and grantor in deed of trust desires to redeem he must give immediate notice to purchaser of his intention so to do and give security as required by section 2830. *Union, etc. Ins. Co. v. Rogers*, 155 Mo. 307, 311; *Moss v. King*, 212 Mo. 578. (6) A mere promise without consideration not to foreclose will not afford grounds for a suit to redeem. *Sturgeon v. Mudd*, 190 Mo. 200. (7) An action to cancel a deed of trust on the alleged ground that it has been paid cannot be treated as a suit to redeem. *Moss v. Brant*, 216 Mo. 641. (8) No party interested in a debt secured by a deed of trust ought to be a trustee in the deed, nor ought the son of the party, certainly, not within the debtor's knowledge of his interest and consent to his appointment. *Long v. Long*, 79 Mo. 644; *In re M. Mayfield*, 17 Mo. App. 690.

ROBERTSON, P. J.—Plaintiffs, as the children and only heirs at law of John S. House, deceased, brought this action to redeem 220 acres of land in

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Howell county, from a sale under a deed of trust given by said deceased to defendant Hogan, as trustee, to secure a note to the defendant bank. The sale under the deed of trust was made to defendant Clarke.

We are of the opinion that this case involves title to real estate within the meaning of section 12, article 6 of the Constitution. There are instances in which the Supreme Court has recognized its jurisdiction in actions of this character, as in the cases of Keith v. Browning, 139 Mo. 190, 193, 40 S. W. 764; Sturgeon v. Mudd, 190 Mo. 200, 202, 88 S. W. 630; and Arnett v. Williams, 226 Mo. 109, 125 S. W. 1154.

This cause is, therefore, transferred to the Supreme Court. All concur.

STATE OF MISSOURI ex inf. J. H. Mason, Prosecuting Attorney, Relator, v. SPRINGFIELD ATHLETIC CLUB, Respondent.

Springfield Court of Appeals, May 5, 1913.

QUO WARRANTO: Forfeiture of Corporation's Charter. Information was filed against respondent corporation to forfeit its franchise, alleging a perversion and misuse of said franchise. Respondent's answer denied the allegations. A commissioner was appointed, the evidence was taken and the commissioner made his report. Thereafter respondent filed application to withdraw its answer and at the same time filed written consent to the forfeiture of its charter. The application is allowed, the answer withdrawn and the charter is forfeited.

Original Proceedings. Quo Warranto (Greene County).

WRIT OF OUSTER AWARDED.

Mann, Todd & Mann for relator.

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Neville & Gorman for respondent.

ROBERTSON, P. J.—On November 9, 1912, the prosecuting attorney of Greene county filed in this court his information against the respondent alleging its incorporation under article 10, chapter 33, Revised Statutes 1909, in 1911 “for the purpose of advancement in learning, physical culture among its members, the procuring of literature and the distribution thereof among its members on the subject of physical culture, hygiene and athletics, and the giving of exhibitions of fetes of strength, skill and physical prowess to and for its members, and the promotion of social intercourse and pleasure among its members by such harmless and lawful measures as will tend to their physical, moral, intellectual and social up-building,” and alleging a perversion and misuse of its corporate authority, franchise and privileges. The prayer of the information is “that said respondent may be ousted of all its franchise and corporate privileges and that the same may be declared forfeited.”

Respondent appeared and filed answer admitting its incorporation but denying each and every other allegation in said information contained.

After the issues were thus made up Hon. Charles L. Henson was appointed commissioner to take testimony, make findings of fact and state his conclusions of law thereon. In due course of time the testimony was taken, the commissioner made his report and recommended that the relief prayed for by the relator be granted. Thereafter the respondent filed here its application to withdraw its answer and filed its written consent to the forfeiture of its charter. Said answer is withdrawn and it is ordered that said respondent be and it is hereby ousted of all its franchise and corporate privileges and that the same be and they are hereby forfeited. *Sturgis, J.*, concurs.; *Farrington, J.*, not sitting.

JOHN D. TAYLOR, Respondent, v. HARVEY W. PERKINS, Interpleader, and C. W. PRINCE, Interpleader, Appellant.

Kansas City Court of Appeals, April 7, 1913.

1. **INTERPLEADER: Equity: Law.** Where a bill of interpleader is filed asking that opposing claimants interplead for a certain fund, the proceeding is in equity and should not be tried as a case at law.
2. **EQUITY: Advice of Jury.** Though a proceeding is in equity, the trial court may take the advice of a jury, not being bound thereby.
3. _____: _____: **Attorney's Fee: Lien: Discharge.** In a proceeding to enforce a lien for an attorney's fee, if it be shown that the attorney was rightfully discharged for failure to serve his client faithfully, he cannot enforce a lien for a fee.
4. _____: _____: _____: **Champerty: Consideration.** If an attorney agrees to pay the costs of a case as a part of the consideration for employing him, it is champertous and void and no lien for a fee can be enforced.
5. _____: _____: _____: **Attorney's Lien: Common Law.** The statute of Missouri giving an attorney a lien for a contingent fee consisting of a part of the judgment to be recovered, does not repeal the common law of champerty and maintenance.
6. _____: _____: _____: **Interest in Litigation: Contract: Consideration.** A person who has an interest in the subject of litigation may lawfully contract to aid in carrying it on, without being guilty of maintenance, provided such interest has been acquired independently of the contract and is not acquired in consideration of the aid to be rendered.
7. _____: _____: **Champerty and Maintenance: Distinction: Gain.** There is a distinction between champerty and maintenance. It is not maintenance for relatives, or friends in charity, to aid one in litigation. But if they render the aid for gain of a part of the matter litigated, it becomes champerty and is forbidden by law.
8. _____: _____: _____: **Contract: Writing: Consideration.** Though a contract is in writing and complete on its face, yet it is proper to receive oral evidence showing the consideration was unlawful.

Taylor v. Perkins.

Appeal from Chariton Circuit Court.—*Hon. Fred Lamb, Judge.***REVERSED AND REMANDED.**

Roy McKittrick, C. W. Prince and T. A. Witten for appellant.

The court erred in refusing to sustain defendant Prince's demurrer to the original bill of interpleader. The bill itself sets up all the facts necessary to establish said defendant's lien against the fund in the interpleader's hands, and the court should have sustained the demurrer and ordered the fund paid to defendant Prince. R. S. 1909, sec. 964-65; United Railways Co. v. O'Connor, 153 Mo. App. 128; Wait v. Railroad, 204 Mo. 491; Taylor v. Transit Co., 198 Mo. 715. After the court improperly submitted the case to the jury, it might have brought about the correct result by directing the jury to find the verdict for the plaintiff.

L. N. Dempsey and J. A. Collet for respondent.

(1) The trial court had the right to submit the facts in issue to a jury and could either adopt the finding of the jury and pronounce judgment thereon or disregard the finding of the jury as it saw fit. Weeks v. Senden, 54 Mo. 129; Borchers v. Barckers, 158 Mo. App. 267. (2) There were no declarations of law asked or given, hence the judgment will be affirmed, if it can be done upon any theory applicable to the facts of the case: Gentry v. Templeton, 47 Mo. App. 55. (3) A contract founded upon champertous consideration is against public policy and void. Interpleader Prince seeks to recover on a champertous contract. In such case, claimant can have no relief: Bent v. Priest, 86 Mo. 490; Duke v. Harper, 66 Mo. 59; Comstock v. Flowers, 109 Mo. App. 275; Barmgrover v. Pettigren, 2 L. R. A. (N. S.) 260; Re Snyder, 14 L. R. A. (N. S.) 1101.

ELLISON, J.—A bill of interpleader was filed by plaintiff Taylor setting forth that he held in his hands the sum of \$980, which was claimed by C. W. Prince, an attorney at law, as a fee, and by Harvey W. Perkins as administrator of the estate of James R. G. Perkins. Taylor asked that these parties be required to interplead for the money. The trial court made the order and the parties filed their claims accordingly. The court, over the protest of Prince, then proceeded to try the case with a jury as an ordinary action at law. A verdict was rendered for Perkins and judgment entered accordingly. Whereupon, after an unsuccessful motion for new trial, Prince appealed.

It was error to treat the case as an action at law. It should have been tried as a case in equity. [Grand Lodge v. Elsner, 26 Mo. App. 108; Funk v. Avery, 84 Mo. App. 490; Duke, Lennon & Co. v. Duke, 93 Mo. App. 244, 251; Smelting Co. v. Lead Works, 102 Mo. App. 158, 164; Borchers v. Barkers, 158 Mo. App. 267.]

It is quite true that a trial court in an equity case may frame issues and submit them to a jury, rather for the advice of the latter, the court not being bound by the verdict. But this record does not disclose that procedure was adopted, or that the case was other than a trial at law where the verdict if sustained by any substantial evidence is binding on the court.

It seems that James R. G. Perkins was a brother of Harvey Perkins, the administrator, and that James was negligently killed by the servants of the Chicago, Burlington & Quincy Railway Company, and that an action for damages was instituted in the State court by Harvey as administrator against the railway company. Prince being his attorney. The cause was removed to the Federal court and then dismissed and brought again in the State court and again removed. At this point Prince was discharged and other attor-

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neys employed, who again dismissed and again brought in the State court where it proceeded to judgment for six thousand dollars. This was compromised for twenty-eight hundred dollars. Prince had a contract for a fee of thirty-five per cent of what should be obtained from the railway company, amounting under the compromise to nine hundred and eighty dollars, for which he claims to have an attorney's lien.

There was evidence tending to show that Prince was rightfully dismissed for failure to faithfully perform his duty to his client. And there was evidence tending also to show that he was guilty of champerty in that he agreed to prosecute the suit at his own expense, paying the costs thereof. If, on retrial, the evidence shows these matters to be true, he would not be entitled to his fees, nor, of course, to enforce a lien therefor. [Bent v. Priest, 86 Mo. 475, 490; Duke v. Harper, 66 Mo. 51; Kelerher v. Henderson, 203 Mo. 498, 515; Breeden v. Ins. Co., 110 Mo. App. 312; Phelps v. Manecke, 119 Mo. App. 139.]

But Prince insists that his contract was in writing, and that no mention of an agreement to pay the costs is made in the writing and as the law is that a written contract plain on its face cannot be altered or added to, no oral evidence can be heard on the subject of maintenance. That is not the law. If it were it would permit a recovery on a promissory note given as compensation for the commission of a felony. The maintenance here alleged is a part of the consideration of the contract of employment, and as such may be shown.

But it is insisted that since the law permits an attorney to become interested in an action by authorizing him to maintain a lien for a contingent fee out of the proceeds of the suit, he is rightfully and legally interested in the action and may properly agree to pay the costs. This is put upon the ground that one who is interested in the subject-matter of litigation may contribute towards its prosecution. But this in-

terest must have existed or been acquired in some way other than through the contract containing the champertous agreement. In Gilman v. Jones, 87 Ala. 691, quoting from 3 Am. & Eng. Ency. of Law, 76, it is said, "but it is essential that it (the interest) be distinct from what he may acquire from the party maintained." In Ware's Adm'r v. Russell, 70 Ala. 174, 179, it is said that: "The corrupting element of the contract is its tendency to foment or protract litigation, its dependency for its value upon the termination of suits, and its introduction to control and manage them, of parties *without other right or interest than such as is derived from the contract.*" (Italics ours.) In 2 Story's Eq. Jur., sec. 1050, it is said that one "may purchase by assignment the whole interest of another in a contract, or security, or other property which is in litigation, provided there be nothing in the contract which savors of maintenance; that is, provided he does not undertake to pay any costs, or make any advances beyond the mere support of the exclusive interest which he has so acquired."

It would be unsound, morally and legally, to say that one may by a champertous agreement acquire an interest in litigation which interest instantly legalizes the agreement.

We are cited to a case in Michigan (Wildey v. Crane, 63 Mich. 720) where a man owned a horse which he insured against loss by fire. The horse was burned in such way as that the insurance company was not liable under the policy, as was afterwards decided. The owner considered his claim doubtful, and having been advised that the company was not liable, had abandoned all idea of attempting to recover anything. A lawyer then approached him and proposed that if he would permit him to bring a suit and it failed it should not cost him anything and that he (the lawyer) would pay all costs incurred; but if successful he should have one-half the sum recovered. The owner agreed. the

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action was brought and lost, the costs being assessed against the owner, which he was compelled to pay. He thereupon brought an action against the lawyer on his agreement, and champerty was set up by the latter in avoidance. It was held that the agreement was valid and the owner recovered. But the court held the agreement undoubtedly to be champertous under the common law and only sustained the action on the ground that the statutes of Michigan had repealed the law of champerty. And in Maine (*Low v. Hutchinson*, 37 Me. 196) where the common law is not repealed by statute, such an agreement was held to be void.

The Michigan statute thus held to repeal the common law of champerty, reads as follows: "That all existing laws, rules, and provisions of law restricting or controlling the right of a party to agree with an attorney, solicitor, or counsel for his compensation are repealed, and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties."

We have no such statute in this State. On the contrary, our attorneys' lien statute (Sec. 964, R. S. 1909) declares that: "The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, *which is not restrained by law*. . . ." A champertous agreement is restrained by law in this State (*authorities infra*) and therefore that section of the attorneys' lien statute does not legalize an agreement void at common law.

But it is said that the statute (sec. 965) allows an attorney "to contract with his client for legal services rendered or to be rendered him for a certain portion or percentage of the proceeds of any settlement of his client's claim or cause of action;" and that this implies a right to make a valid agreement to pay the costs. That implication does not arise on the statute. For, the statute being so particular in its terms and omitting to authorize such an agreement, unlawful

without the statute's aid, leaves the inference that it was not intended. The right to contract for a contingent fee, or a certain portion of the sum recovered, is a legal right without the statute and was repeatedly recognized before its enactment. It is only when the contract includes prosecuting the case at the attorney's expense, such for instance, as payment of costs, that the illegality appears: *Crow v. Harmon*, 25 Mo. 417; *Duke v. Harper*, 66 Mo. 51, 60, and next to closing paragraph page 61. See also statement of the case, page 51. Though that is not necessary to its illegality in some States. [Ackert v. Barker, 131 Mass. 436.] The cases of *Taylor v. Transit Co.*, 198 Mo. 715, 731—*Kelerher v. Henderson*, 203 Mo. 498, 513-515—and *Shelton v. Franklin*, 224 Mo. 342, 355, clearly show that if the contracts there referred to had included payment of costs, they would have been void for champerty.

That the circumstance that an attorney is now entitled to a lien by reason of the statute, does not affect the question of a champertous agreement, is further made manifest by the suggestion that in many jurisdictions an attorney's lien was recognized as a common law right, yet an agreement to carry on the action and pay the costs was regarded by the same courts as champertous and unlawful.

We do not understand why defendant should cite us to *Breeden v. Insurance Co.*, 220 Mo. 327, 424. That case was decided by this court (110 Mo. App. 312) and on re-trial was appealed to the Supreme Court. In each of the opinions, in both courts, the law of champerty is fully recognized. The fact that the Supreme Court referred to the old common law breadth of the law of champerty being now lessened, and to the fact that the attorney's lien act has limited some phases of maintenance, is by no means an intimation that champerty in its worst and most distinct form, viz.,

the payment of costs, as a part of the contract to share the judgment, was no longer unlawful. It is as much the policy of the law now to discourage the stirring up of strife and bad blood by holding out the inducement of freedom from costs in the event of failure, as it ever was.

Judge Walker, in *Morton v. Forsee*, 155 S. W. 765, refers to the lawyers' lien statute and states, in effect, as in the Breeden case, that that act had "in regard to some phases of maintenance" modified the common law. Thus, in England and many of the States it was champerty if lawyer and client agreed that the former's fee should consist of a share of the recovery, though not connected with an agreement to pay costs. That, as seen above, was not the law in this State, though some punctilious lawyers questioned the propriety of such contracts. As the books term it, the old law of champerty was too extreme in some of its phases. Thus, in *Wallis v. Portland*, 3 Ves. 494, 501, it is suggested whether the old law did not make it maintenance in the pleader "to state a case with more advantage than belongs to it." And in *Pierson v Hughes*, 1 Freem. 71, it was said, as *amicus curiae*, "that it had been adjudged maintenance for a man to speak to a counsel or an attorney to encourage the suit wherein he had no interest;" and this extreme statement is referred to in *Wallis v. Portland*, supra, 503. So it is said in *Morton v. Forsee* that the attorneys' lien statute was enacted "to place them (attorney and client) upon the same footing as other persons having business relations with each other, but in no way affecting the rule applicable when a fiduciary relation is shown to exist," which, of course, would not make a champertous agreement valid. We do not see how these references by the Supreme Court to the attorneys' lien statute can be thought to have any bearing on the question in this case.

As has already been said, an attorney in this State could, before the statute, contract for a contingent fee consisting of a part of the recovery. The statute now, in addition, confers the right to a lien to enforce such agreement.

In the cases which have been decided by the Supreme Court, and in this court, it has been stated and conceded that relations may aid one another, that the prosperous may, in charity, aid his poor and unfortunate friend, without incurring guilt of maintenance. But where sordid gain is the contractual motive, the ties of blood and of charity and friendship are succeeded by selfishness, and what would have been humane maintenance becomes unlawful champerty. In this respect there is a difference between champerty and maintenance. Relationship, friendship, charity, may excuse maintenance, but not champerty. In *Hutley, L. R.*, 8 Q. B. 112, *BLACKBURN*, J., said that plaintiff's counsel had "produced no authority that blood relationship between the parties made any difference as to champerty." And *LUSH*, J., said, "I am of the same opinion. It is conceded by the plaintiff's counsel that if it were not for the plaintiff's interest the contract in the declaration would amount to champerty. First, the plaintiff is a cousin of the deceased; that would give him no interest. Nor would the relationship to the defendant justify an agreement of champerty. . . . There are cases which show that there are circumstances which may justify a person in maintaining, that is, in assisting, one of the litigant parties in a suit; certain relationship would justify maintenance; but I know of no case, and Mr. Day has not produced the semblance of an authority for saying that relationship or collateral interest justifies champerty."

The right of an attorney to aid and assist his client by making advances for him, expecting to be reim-

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bursed by the client, is proper enough, and should not be confounded with the evil of champerty and maintenance.

The judgment will be reversed and the cause remanded. All concur.

DAVID LONGSDORFF, Respondent, v. JOHN MEYERS et al., Appellants.

Kansas City Court of Appeals, April 21, 1913.

1. **SALES: Part of Apples on Trees: Price: Segregation: Title: Loss.** Where one person sold to another all of the apples in his orchard which would grade first and second grade, at a certain price per barrel, the purchaser to pick and grade them in the future, and the apples were frozen before they were picked and separated, it was held that the title had not passed and the loss was the seller's.
2. **_____: _____: _____: Appropriation: Future Measurement.** One may sell all the apples in his orchard at a certain price per barrel, to be picked in the future, and it will be an appropriation of them by the buyer and the property passes to him *in præsenti*. The fact that the amount of the purchase money is to be ascertained by future measurement does not prevent an immediate passing of the title.
3. **_____: _____: _____: Separation: Setting Apart: Title.** Where personal property is a part of a general mass or lot and such part is sold, the title does not pass until the part has been separated and set apart for the purchaser.

Appeal from Chariton Circuit Court.—*Hon. Fred Lamb, Judge.*

REVERSED.

F. C. Sasse for appellants.

J. A. Collet for respondent.

ELLISON, J.—This is an action for the purchase price of a crop of apples on the trees. The judgment in the trial court was for the plaintiff.

The finding of the trial court (a jury was waived) being in favor of plaintiff, we will consider the facts to be what the evidence in his behalf tends to show them. It appears from such evidence that about the last of August, 1911, he and defendants made a verbal contract for the purchase of his crop of apples then on the trees in his orchard, which were of first and second grade, at \$1.25 per barrel for the fall apples and one dollar a barrel for the winter apples of either grade, and that fifty dollars was paid to bind the bargain. Defendants were to take them from the trees and grade and barrel them and the number of barrels was to determine the amount of the purchase price. The apples failing to fall within either the first or second grade were not included in the contract. The statement of plaintiff, in his testimony, was that: "He was to take all of the apples that would grade number 1's and 2's." He was not "to take any faulty apples." Defendants picked, paid for and took away the fall apples, but the winter apples were allowed to remain on the trees until they were caught in a "cold snap" November 2nd, and frozen so as to be worthless, and defendants refused to take them.

The question in the case is whether the loss should fall on the seller or buyer; and that depends upon the question whether the title to the apples passed from plaintiff to defendants under the contract stated. Where the sale is of specific personal property at a named price, the contract of sale is an appropriation of the property to the buyer and it is thenceforth at his risk. But where anything remains to be done between the parties before the goods are to be delivered, as separating the specific quantity sold from a larger mass, or identifying them when they are mixed with others, a present right of property does not attach in the buyer. If the specific property is ascertained in the contract, and the price fixed, though the total amount of the price is to be ascertained by measure-

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ment, weight or count, the latter circumstance will not prevent a present transfer of the title. As, if one sells a certain bin of wheat at so much per bushel, the total purchase money to be ascertained by measurement; or, if he should sell a flock of sheep or a drove of hogs, then in his pasture, at so much per head, the total purchase price to be afterwards found by counting, the title would immediately pass to the purchaser. [Cunningham v. Ashbrook, 20 Mo. 553; Bass v. Walsh, 39 Mo. 192; Williams v. Evans, 39 Mo. 202; Southwestern F. & C. P. Co. v. Stanard, 44 Mo. 71, 83; Ober v. Carson, 62 Mo. 209; Hamilton v. Clark, 25 Mo. App. 428; Toney v. Goodley, 57 Mo. App. 235, 241; Grocer Co. v. Clements, 69 Mo. App. 446; Glass v. Blazer, 91 Mo. App. 564; Wheless v. Grocer Co., 140 Mo. App. 572, 585.] To these may be added an interesting case on the same subject: Commonwealth v. Hess, 148 Pa. St. 98; as well as the following: Crofoot v. Bennett, 2 N. Y. 258, a sale of brick in a kiln, some not yet burned; Groat v. Gile, 51 N. Y. 431, a sale of a flock of sheep at four dollars per head, except "two bucks and a lame ewe," which were selected out; Foot v. Marsh, 51 N. Y. 288, a sale of 100 barrels, containing 4000 gallons of oil, this being a part of 150 barrels containing different qualities; Lingham v. Eggleston, 27 Mich. 324, 329, 330, a sale of "all the pine lumber on his yard at Birch Run at the following prices: For all common, eleven dollars, and to include all better at the same price; and for all culls, five dollars and fifty cents per M." It was held there was no transfer of title by the seller; the court stating, at p. 330, "that neither the quality nor the quantity was determined; . . . The price to be paid was consequently not ascertained, and could not be until the qualities were separated and measurement had."

The subject-matter of this agreement shows it to be an executory contract and not a sale *in praesenti*.

The sale was made before the apples in controversy were mature. The whole orchard as it stood, or the whole of the first and second grade, at that date, were not sold. The apples sold were the first and second grades which should be in existence at gathering time. If the green apples had been wholly or partly destroyed by a storm the day following the contract, all must say the loss would have been plaintiff's. Yet that concession determines the case. It shows that no title could pass until the selection and measurement were made and that was not to be had until the season for gathering had come.

The foregoing cases illustrate different conditions with correspondingly different results. As instances in the cases from our own courts, Grocer Co. v. Clements, was where fifty sixteen-pound butts of tobacco out of a total lot of ninety, were sold, but not selected or set apart from the whole lot; it was held not to be a transfer of title. And Glass v. Blazer, was where the entire crop of flax growing on thirty acres was sold at one dollar per bushel as afterwards to be measured; it was held to be a present transfer of title.

Applying the law to the contract, as stated by plaintiff himself, there was no transfer of the title to the apples and no action for the purchase price can be maintained. The apples defendants were to get were not set apart. They were to be selected in the future and until selected they were not appropriated to defendants. First and second grades were to be separated from the others, and it was never done. A large part of personal property is classified, rated or graded, and to uphold this action we would be compelled to announce that it would be a legal sale *in praesenti* for one to sell all that part of the wheat in a bin which will grade as No. 1. If plaintiff had sold his entire orchard at a stated price per barrel, the amount of the purchase money to be ascertained by measurement then to be had, it would have been a present transfer

of title. But he did not do that; he sold an unascertained part of his orchard, which was to be selected, separated and appropriated in the future. "A contract to sell personal property which is not specific or designated, is purely executory until the property is designated or segregated, and the vendee gets no title until this has been done." [Metal Co. v. Daugherty, 204 Mo. 71, 81.] "When upon a verbal sale of chattels anything remains to be done, between the vendor and vendee, before the goods are to be delivered, as separating the specific quantity sold from a large mass, or identifying chattels which are mixed with others, a present right of property does not attach in the vendee." [Bass v. Walsh, *supra*.]

In this connection plaintiff insists that by the terms of the contract nothing was left to be done by him as vendor; and evidence is pointed out where the contract was stated to be that defendants should do the selecting and measuring of the apples. This case does not make it necessary for us to say whether the contract may not well show no sale *in praesenti*, where the vendor is through and further action is only to be taken by the vendee. [See 3rd Rule, in Benjamin on Sales, sec. 320; and Harkness v. Russell, 118 U. S. 1. c. 668.] It is said that the intention, as gleaned from the contract and its subject-matter, should govern. "It is not important who is to do the weighing or measuring, except as that fact may indicate the intention of the parties as to the time the title is to pass." [Benjamin on Sales, p. 298; Ward v. Shaw, 7 Wend. 404.] We need not make this a point of decision from the fact that we do not interpret the evidence as showing that plaintiff as seller had nothing to do with the measurement and selection of the apples. It is true it was stated that defendant's were to do this; but that meant they were to do the physical act at their expense. It is manifest that the selection of the apples and their measurement was not at the uncontrolled will of de-

fendants. Necessarily plaintiff, as seller, was to do these things concurrently with defendants, the latter doing the labor. If the apples had not frozen and had decreased heavily in price so as to make it to defendants' interest to take as few as possible, would plaintiff then have said he had nothing to do with the selection? Taking the nature of the transaction, it is too clear for doubt that plaintiff necessarily had a part in the selection of the apples.

It is the law as shown by citations in plaintiff's brief, that if a given quantity of personal property which constitutes a part of a larger mass of exactly the same kind and quality (as, for instance, wheat in an elevator) is sold, the title to the quantity sold will pass, though it has not been separated from the mass. [Brownfield v. Johnson, 128 Pa. St. 254; Nash v. Brewster, 39 Minn. 530.] And so replevin may be had for one's part of such property. [Kaufmann v. Schilling, 58 Mo. 218.] But it is said in the first of these cases that if "the property sold is part of a mass made up of units of unequal quality or value, selection is essential to an execution of the contract"—that is, the passing of title. The same, in effect, is said in the other case. If we apply these cases to the facts as stated by plaintiff himself, he fails in his case. For defendants were not to take a part of a larger mass of exactly like kind. They were to select a part of a larger mass of unequal quality, and until selection the title did not pass.

Whether plaintiff has a cause of action for damages for negligence; based on defendants' failure to gather the apples before they froze, has not been considered.

The judgment is reversed. All concur.

KATE BOLGER, Appellant, v. KANSAS CITY
MATERIAL COMPANY, Respondent.

Kansas City Court of Appeals, May 5, 1913.

1. **NEGLIGENCE: Blasting: Jury Question.** Where the customary number of holes drilled for blasting rock at a quarry, was from 2 to 7, and in the instance in controversy it was 11, and where in "springing" the holes for loading with explosives, it was noticed that the smoke would come out of the side of the ledge, showing the rock to have "seams" in it, and where the explosion following was of extraordinary destructive force, casting rock of great size horizontally a distance of 300 feet, some of the smaller rock striking and killing a workman—it was held that this was sufficient evidence of negligence to submit to a jury.
2. _____: _____: _____: **Contributory Negligence: Jury.** Where, in protecting himself from a blast in a rock quarry one of the workmen got under a railway car 300 feet away, a place the men had customarily used for protection, it was held that it should not be said, as a matter of law, that he was guilty of contributory negligence.
3. _____: _____: _____: **Petition: Cause of Action: Statute of Jeofails.** Where a petition, though defective, states a cause of action, the statute of jeofails will cure its defects after verdict.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas, Judge.*

REVERSED AND REMANDED (with directions).

McCune, Harding, Brown & Murphy for appellant.

(1) The instruction followed the petition and was not too general. *Moore v. Railroad*, 136 Mo. App. 214; *Buckman v. Railroad*, 100 Mo. App. 34. (2) Defendant cannot be heard to complain that instruction 2 is not specific enough, for two other reasons: First, all of its instructions were specific as to negligence; indeed, excluded all negligence except warning; second,

the defect, if any, amounted to nondirection, and even had defendant failed to ask for specific direction, it could not be heard to complain by reason of said failure, as it was its duty to do so. *Rippetoe v. Railroad*, 138 Mo. App. 407-8; *Ashby v. Gravel Road Co.*, 111 Mo. App. 79; *Rattan v. Railroad*, 120 Mo. App. 270; *Wilson v. Railroad*, 142 S. W. 782; *Browning v. Railroad*, 124 Mo. 55.

Hogsett & Boyle for respondent.

Defendant's demurrer should have been sustained. The case should not have been submitted to the jury, for two reasons. (a) Because plaintiff failed to show any negligence on the part of defendant. *Mihelich v. Mignery*, 155 Mo. App. 325; *Zeizenmeyer v. Lime & Cement Co.*, 113 Mo. App. 330.

ELLISON, J.—Defendant had an extensive rock quarry and had a number of men engaged in and about the premises, among whom was plaintiff's husband whose service was that of fireman of a stationary engine. On the 6th of October, 1911, he was killed by a rock thrown by a blast which had been set off by direction of those in charge of the blasting. She brought this action for damages and obtained a verdict for five thousand dollars. The trial court sustained defendant's motion for new trial and also the motion in arrest of judgment. Plaintiff thereupon appealed.

The reason given by the trial court for ordering the new trial was that defendant's demurrer to the evidence should have been sustained; and that error was committed in refusing defendant's instructions Nos. 3, 5, 6, 7 and 8; and that further error was committed in giving plaintiff's instruction No. 2. The first cause is not well assigned if there is any substantial evidence in plaintiff's favor on two questions, one as to defendant's negligence, and the other deceased's contributory negligence. It was shown that the usual blast was

prepared by drilling from two to seven holes to a proper depth, then the holes were "sprung" by enlarging the bottoms by light explosions, then filling them with explosives, connecting them by wire and firing from a battery. There was a blacksmith shop about three hundred feet from the ledge where the blasting was done; and at same distance, about twenty feet from the shop, a steel railroad car, with a V-shaped bottom, the small part going down to within ten inches of the track. The men were in the habit of eating their noon lunch at this shop and were also in the habit of taking refuge under this or some other car when a blast was announced as ready to be set off. In the instance which concerns this case, a blast of eleven holes was had, and when these holes were being "sprung" it was noticed that there were seams that came out to the edge or side surface of the ledge, which let the smoke out. Underneath the solid rock there was a stratum of softer or soapstone rock. When all was about ready, warning was sent by or through the foreman warning the men to get out of the shop as rock might fall upon and through it. The men, including deceased, then went to the car and got under it. Presently the explosion took place and it was characterized by some witnesses as the worst they had ever seen. It threw great quantities of rock in every direction, especially horizontally out from the face of the ledge. Some of these were stated to be as large as "a cooking stove," thrown three hundred feet. Some of them broke a steel car nearby; others broke a cement wall. One of the smaller ones in some way was thrown under the car where it struck and killed deceased.

Considering the nature of the substrata at the ledge, the seamy character of the ledge itself, as evidenced by the smoke coming out when the holes were being "sprung;" considering the increased number of holes, the character of the explosion itself and the extraordinary effect it had upon the surroundings—we

think it cannot be reasonably said that there was no substantial evidence of negligence on defendant's part. Nor can it be said, in any degree of reason, that, as a matter of law, this negligence was not the proximate cause of the injury.

So we are equally certain that the evidence was not such as to authorize a declaration that deceased was guilty of contributory negligence as a matter of law. It was a place where the men customarily went and defendant's foreman must necessarily have known it. More than that, it is a reasonable inference that he knew it in this instance, because, although he warned the men out of the shop, he did not suggest that they hunt some other place than the car.

Nor do we think there was any error in plaintiff's instruction No. 2. It does not assume that defendant was guilty of negligence. It looks as though that criticism could be made of the expression "caused by the failure," etc. But when connected with the remainder of the instruction it is apparent the jury was required to find there was a failure. All criticism could have been avoided by the added words "if any," or, "if there was a failure." As to the complaint of not defining negligence, we think it does. While that word is not used, yet its elements are stated properly. And as to the complaint that it was not confined to the negligence charged in the petition, we think that also not well founded. The instruction submits negligence in preparing or loading or discharging or executing the blast and that is practically the language of the petition. We think the instruction is supported by *Dowell v. Guthrie*, 116 Mo. 646; s. c., 99 Mo. 653. We do not think the authorities cited by defendant are applicable. The instruction does not submit the generality, that if the jury believe the defendant was guilty of negligence, without directing attention to acts or kinds of negligence relied upon. It requires that the negligence must be found in the things specified, viz., preparing,

loading or in discharging the blast. The evidence had shown the preparation made for receiving the explosives, the loading of them, the nature of the place, etc., etc. Certainly it would not be necessary in a case of this nature to require the jury to pass upon how many pounds of explosives should be used.

The court did not err in refusing defendant's instructions 3, 5, 6, 7 and 8. The first and last one made a mere warning to deceased that a blast was to be fired in time for him to have reached a place of safety, an absolute excuse or cure for all the negligence charged by plaintiff. Nos. 5, 6 and 7 declared, in terms, that the seams in the rock and an extraordinary number of holes blasted, had nothing to do with deceased's death. Manifestly these were all wrong. They destroyed plaintiff's case as a matter of law.

The remaining question is, did the petition state a cause of action? It is not worth while to ask at this stage of the case whether the petition was a model pleading. The only proper inquiry is, will it support a judgment? Is it sufficient after verdict? That it is, there can be no doubt. It charges that the position in which deceased took shelter would have been safe had defendant used due care in blasting. But, as plaintiff alleged, defendant negligently prepared, loaded and executed the blast, so that with the use of the explosives a large rock was thrown against deceased, defendant complains that it was not charged that deceased was at a point within danger from such blast: and that it did not charge a failure to warn deceased. If there is anything in such criticism, it is cured by the statute of jeofails. [Sec. 2119, R. S. 1909, and subd. 8 & 9.] But aside from this, we think defendant misconstrues the effect of what is charged in saying that the petition only charged negligence in throwing a rock a great distance to where deceased was. The evident intention was to charge negligence in preparing, loading and discharging the blast; and the record of the

trial itself shows it was so understood. [Knight v. Donnelly, 131 Mo. App. 152; McKinney v. Northcutt, 114 Mo. App. 146.]

What we have said covers the action of the court in sustaining the motion in arrest of judgment. We think the judgment should be reversed and the cause remanded with directions to reinstate the verdict and render judgment thereon. All concur.

LUCILE DIX, Minor by Next Friend, GEORGE M. YOUNGER, Respondent, v. ELIZABETH MARTIN, Appellant.

Kansas City Court of Appeals, May 5, 1913.

1. **DAMAGES: Assault: *Loco Parentis*.** Plaintiff, a minor and an orphan, sued to recover damages for an assault on her by defendant. The latter tied her feet and hands and cruelly beat and whipped her. *Held*, that the assault was wicked and criminal and, assuming that defendant stood in the relation of a parent to plaintiff, she should answer for the damages resulting from such excessive punishment.
2. **PARENT AND CHILD: Liability of Parent.** Where a person assumed toward a child, not his own, a parental character, holds the child out to the world as a member of his family toward whom he owes the discharge of parental duties, he stands *in loco parentis* to the child and his liability is measured by that of the relationship he thus chooses to assume.

Appeal from Cooper Circuit Court.—*Hon. John M. Williams*, Judge.

AFFIRMED CONDITIONALLY.

John Cosgrove and Daniel W. Cosgrove for appellant.

(1) The trial court proceeded throughout on the theory that defendant did not stand *in loco parentis* to the plaintiff. This was an error and instruction

Nos. "a" and 1 should not have been given at the request of the plaintiff. A person assuming the parental character and discharging parental duties is a person *in loco parentis*. 19 Am. & Eng. Ency. Law (2 Ed.), p. 518. (2) A stepfather who takes the children of his wife by a former marriage into his family and holds them out to the world as members of his family stands *in loco parentis*. Eickhoff v. Railroad, 106 Mo. App. 541; Academy v. Bobb, 52 Mo. 357. (3) The grandparents of the plaintiff voluntarily surrendered the care and custody of plaintiff to the defendant for the term of plaintiff's minority according to the defendant's testimony, and the grandparents could not revoke the agreement which was fairly entered into, unless the welfare of the plaintiff demanded it. Cunningham v. Barns, 37 Wis. 746, 38 Am. S. R. 57. (4) Instructions six and seven asked by the defendant should have been given and it was error to refuse them. The relation of parent and child existed between plaintiff and the defendant, and conferred upon the defendant a lawful right to correct the plaintiff. State v. Koonse, 123 Mo. App. 662, 663. (a) The defendant was not liable for the infliction of punishment but the excess which constitutes the offense. Johnson v. State, 2 Humphreys (Tenn.), 283, 36 Am. Dec. 322; State v. Jones, 95 N. C. 588, 59 Am. R. 282; 2 Am. & Eng. Ency. Law (2 Ed.), p. 962. (5) The damages are excessive and are the result of passion and prejudice.

W. F. Johnson and W. G. Pendleton for respondent.

(1) A contract for the surrender of the care and custody of a child, made by the father or person *in loco parentis*, is held to be void as against public policy—is revocable. Matter of Clements, 78 Mo. 352; Weir v. Morley, 99 Mo. 484; Matter of Berenice S. Scarritt, 76 Mo. 584; 21 Am. & Eng. Ency. Law (2 Ed.), p. 1039; 6 Am. & Eng. Ann. Cas., p. 939. (2) Whatever the

relation might have been that existed between the defendant and the plaintiff, the defendant was liable for unreasonable, cruel and excessive punishment. *State v. Koonse*, 123 Mo. App. 655; *Cooley on Torts* (2 Ed.), 830; *West v. Forrest*, 22 Mo. 344; *Holke v. Hermann*, 87 Mo. App. 125; *Haycraft v. Grigsby*, 88 Mo. App. 361. (3) The vice of appellant's refused instruction numbered 5 is glaringly apparent—in this, that it instructs the jury that if they believe from the evidence that the defendant acted in good faith, etc., she should be acquitted, notwithstanding the severity or brutality of the chastisement. This is counter to the authorities quoted by the appellant and is in the teeth of the decisions of this, and other, States. *State v. Koonse*, 123 Mo. App. 663; *Haycraft v. Grigsby*, 88 Mo. App. 361; *Landers v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156. Excessive punishment is a question of fact for the jury. *Hinkle v. State*, 127 Ind. 490; *Johnson v. State*, 2 Humph. (Tenn.) 283; *Fletcher v. People*, 52 Ill. 396; *Patterson v. Nutter*, 78 Me. 509; *Classon v. Pinks*, 69 Neb. 278.

JOHNSON, J.—Plaintiff, a minor, sued by her next friend to recover actual and punitive damages for an assault alleged to have been made upon her by defendant on August 12, 1911. Defendant admits having whipped the child on that date and endeavors to justify the act on the ground of parental right. Verdict and judgment were for plaintiff for eight hundred dollars actual, and two hundred dollars punitive, damages and after unsuccessfully moving for a new trial and in arrest of judgment, defendant appealed.

Deprived by death of both parents plaintiff, who was seven or eight years old, and her younger sister went to live with their maternal grandparents in Sedalia. Her grandfather who appears in this action as her next friend was a laboring man but his health was good and his wages sufficient to support his family

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comfortably. He testified that he and his wife assumed the relationship of parents to the orphans and purposed to rear and educate them. Shortly after they became members of his family and before the beginning of the summer season defendant, who lived with her husband on a farm in Cooper county, called on the grandparents at their home and asked that plaintiff be permitted to live with her during the summer. She and her husband were a childless old couple living by themselves, her husband an invalid and she a rheumatic cripple. She desired the services and companionship of plaintiff for her husband and herself and spoke about adopting her but the grandparents dismissed the suggestion by saying that they intended to rear the children themselves and "would live on bread and water before they would separate the children." They allowed defendant to take plaintiff to her home for the summer on the understanding that she would be returned in the fall in time to go to school. The substance of the testimony of defendant is that she was given the custody of plaintiff with the understanding that she would adopt and rear the child as her own. This evidentiary dispute relates to the issue of whether defendant stood *in loco parentis* to plaintiff and had a right to administer necessary corporal punishment for her proper correction or was in the position of one wrongfully retaining the custody of an infant in defiance of the wishes and rights of those who rightfully stood in the place of the infant's natural parents.

In the following September the grandfather requested defendant to return the child, and, on her failure to do so, went to her home in Cooper county and made demand in person. The demand was refused and he was unable even to see his grandchild. He left and shortly after returned with an officer and renewed the demand which again was refused by defendant who would not admit the unwelcome callers to her house. The grandfather being at the end of his resources re-

turned home and, against his will, suffered plaintiff to remain with defendant until the occurrence of the events that gave rise to this action. Defendant does not dispute the facts just stated but says that her refusal of the grandfather's demand was prompted by the facts that it was a breach of their original agreement and that plaintiff evinced a strong disinclination to go back to her grandparents.

Plaintiff lived with defendant for three years as a sort of servant. She waited on the invalid husband of defendant until his death which occurred in a year from the beginning of her service and after that event she lived alone with defendant as her companion and servant. Defendant provided her with sustenance and clothing, was kind to her and treated her as a companion and social equal but did not send her to school and on account of her own crippled condition kept her at home and employed her in domestic service.

The evidence of plaintiff shows that in the evening of August 12, 1911, defendant, for some real or imaginary offense on the part of plaintiff, committed a brutal and cruel assault on her. She tied the child's hands and feet with ropes and then beat her on the back with her fists and with a buggy whip from which the small end or lash had been broken off. After the whipping the child's back from neck to waist was covered with bruises and welts from which blood and water oozed. The following Monday (the assault was on Saturday) plaintiff went to the house of their nearest neighbor and asked protection. They gave her an asylum and shortly after took her to a justice of the peace in a nearby town. He, his wife and others examined plaintiff's back and their testimony corroborates that of one of the witnesses who stated that "she had been whipped from her shoulder down to her waist by some one, and it seemed just like she was black and blue, something like a jelly in some places, and some places looked like water oozing and maybe a little blood but

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it had begun to dry." A criminal prosecution for assault followed, defendant pleaded guilty and was fined one hundred dollars.

Defendant denies that she tied the child's hands and feet or that she beat her with a buggy whip from which the small end had been broken off, but the wounds proclaimed that a bludgeon too heavy and terrible for tender flesh to bear had been wielded with merciless force. That defendant was actuated by blind fury is disclosed in her own admission that "I whipped her harder really, men, than I thought I would, but it was just like my hand was tied—I don't know why." The anger of defendant was caused, she says, by the conduct of plaintiff in slipping off to their neighbor's house and playing in the yard with boys when, owing to the hot weather, she had nothing on but a thin dress. The child was only eleven years old and was merely romping in an excess of youthful exuberance but defendant, deeming such conduct shocking to modesty and decency and deserving severe correction, haled the child home and beat her in the manner described.

Defendant testified on cross-examination: "Q. Didn't you say awhile ago that you told her that if she ever acted that way again, go among boys with that slip on, you would tie her hands and feet and whip her until she couldn't stand up? A. Yes, sir; I threatened to tie her hands and feet and whip her until she couldn't stand up if she ever do such a dirty trick as that again. Q. Didn't you show her the rope? A. It was hanging there."

Plaintiff sustained no permanent injury but her back was two weeks or more in healing and she suffered great physical and mental pain from the assault.

In one of the instructions given at the request of plaintiff the jury were told to return a verdict for her if they believed from the evidence "that the grandfather of the infant plaintiff with whom she had lived

after the death of her parents permitted her to go and live with the defendant at the request or solicitation of the defendant, merely to serve the defendant and her sick husband, and that the grandfather did not give the plaintiff to the defendant, and that the defendant promised the grandfather that the infant plaintiff would be returned to him whenever requested by him; and that later the grandfather requested the defendant to let him have the infant plaintiff, and that the defendant refused to do so, but kept her against the grandfather's consent," etc.

The theory of this instruction is that the facts stated in its hypothesis are inconsistent with the inference that defendant stood *in loco parentis* towards plaintiff and that in the absence of such relationship defendant had no right to inflict corporal punishment upon plaintiff whether such chastisement were moderate or immoderate. Counsel for defendant attack this instruction on the ground that it assumes as a proved fact "that defendant did not stand *in loco parentis* to the plaintiff." This objection is not well grounded. The instruction deals with the question of the nature of the relationship between the parties as embracing an issue of fact, and we think the facts included in the hypothesis would be incompatible with the existence of a relationship akin to that of parent and child. We recognize the rule that where a person assumes towards a child not his own a parental character, holds the child out to the world as a member of his family towards whom he owes the discharge of parental duties, he stands *in loco parentis* to the child and his liability is measured by that of the relationship he thus chooses to assume. [Academy v. Bobb, 52 Mo. 357; Eickhoff v. Railway, 106 Mo. App. 541, 19 Am. & Eng. Ency. of Law, 518.]

But the evidence of plaintiff shows that defendant obtained the custody of plaintiff from her grandparents who had assumed the relations and duties of pa-

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renthood towards her, for the purpose of obtaining the services of plaintiff for a brief time and without any thought of establishing a closer tie than that of mistress and servant. The refusal of defendant to acknowledge her obligation to surrender plaintiff to her grandparents at the end of the period of her service did not alter the relationship to the advantage of defendant. One cannot create a right out of his own wrong. Nor did the fact that plaintiff's grandfather refrained from appealing to the courts for redress change the legal rights of the parties. He explained that poverty prevented him from taking that course but whatever the reason, the fact remained that he continued to be *in loco parentis* to plaintiff, and defendant remained in the position of a wrongdoer who forcibly kept possession of the infant against the consent of him who had established the relation of parent and was entitled to have custody of her. The most that may be said under this evidence in favor of the position of defendant is that the relation of master and servant existed between her and plaintiff. The rule obtaining in this State is that a master has no authority to chastise his servant, no matter how flagrant his violation of duty may be. [2 Am. & Eng. Ency. of Law (2 Ed.), 965.]

There is no error in the instruction nor do we find any in another instruction given at the request of plaintiff which is based on the idea that if plaintiff's grandfather had agreed to give defendant the custody of the child during her minority he had a right to revoke the agreement. Except as modified by statute the general rule is that a parent cannot irrevocably divest himself of the right of custody over his minor child. Despite his contract to that effect the parent will be allowed to recall the right where the welfare of the child thus would be promoted. [Weir v. Marley, 99 Mo. 484; Matter of Berneice S. Scarritt, 76 Mo. l. c. 584; Matter

of Clements, 78 Mo. 352.] And this rule applies to one who stands *in loco parentis*. [21 Am. & Eng. Ency. of Law (2 Ed.) 1039.]

Other instructions given at the request of plaintiff present the issue to the jury of whether the punishment given plaintiff was so unreasonable, cruel and excessive as to constitute an assault regardless of the nature of the relationship of the parties. We find the law properly declared in these instructions. One who assumes to take the place of a parent has a right to inflict reasonable corporal punishment for misconduct of the child, but he has no right to subject the child to inhuman, unusual and torturing castigation and if he does he becomes liable to answer to the child in damages as for a malicious assault. [Haycraft v. Grigsby, 88 Mo. App. 354.] The evidence shows beyond question that defendant, in her furious wrath over what amounted to nothing more than a breach of decorum, subjected the child to an unusual form of punishment of such severity and brutality as to shock the conscience of any reasonable and humane person. [State v. Koonse, 123 Mo. App. 655.] The assault was wicked and criminal and, assuming that defendant stood in the relation of a parent to plaintiff she should answer for the damages resulting from such excessive punishment.

Claim is made that the verdict as to actual damages is excessive. In such cases juries are allowed a wide discretion in the assessment of damages and are entitled to take into consideration, as elements of the plaintiff's damage the physical and mental pain and suffering and the humiliation resulting from the assault. Considering all of the facts and circumstances of the case and giving due effect to the rules we have stated we think the verdict is too large and that the ends of justice would be better served by compelling a remittitur of two hundred dollars and taxing the costs

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of the appeal against the defendant. Accordingly the judgment will be affirmed on condition that within ten days the plaintiff shall enter a remittitur in the amount stated and the costs of the appeal will be taxed against the defendant.

It is so ordered. All concur.

EARL FORD, Respondent, v. MINNIE DIXON,
JOHN KALLAUNER, and FELIX GAMBREL,
Appellants.

Kansas City Court of Appeals, May 5, 1913.

MECHANIC'S LIEN: Possession Under Contract of Purchase.

One who contracts with a person in possession of premises under a contract of purchase containing no provision for improvements, to furnish material for the repair of a building on said premises and does furnish such material, has no lien upon the building, where the purchaser's estate in said property has ended before the action to enforce the lien is commenced.

Appeal from Buchanan Circuit Court.—*Hon. W. K. Amick*, Judge.

REVERSED.

H. B. Williams, Eugene Silverman and G. W. Groves for appellants.

One in possession of land, under a verbal or written contract of purchase, cannot subject to a mechanic's lien either the building or the land, to the prejudice of the legal owner, even under a statute which contemplates a remedy, either against the building or the land. *Dustin v. Crosby*, 75 Me. 75; *Poor v. Oakman*, 104 Mass. 309; *Hickox v. Greenwood*, 94 Ill. 266; *Wagar v. Briscoe*, 38 Mich. 587; *Bank v. Fellowes*, 42 Conn. 36; *Walker v. Burt*, 57 Ga. 20; *Dierks v. Walrod*, 66 Iowa, 354; *Wilkins v. Litchfield*, 69 Iowa, 465.

B. J. Casteel for respondent.

A person in the possession of property, under a contract of purchase, is such an owner or proprietor, under the mechanic's lien law, that a contract made with such person, by a mechanic or material man, to furnish materials and erect a building thereon, or repair a building, already thereon, will afford a sufficient foundation for a mechanic's lien against the building so built or repaired and whatever interest such person has in the land. *Jodd v. Duncan*, 9 Mo. App. 417; *Lumber Co. v. Clark*, 82 Mo. App. 225; 172 Mo. 588; *Lumber Co. v. Harris*, 131 Mo. App. 94.

JOHNSON, J.—Suit to enforce a mechanic's lien. Defendant Kallauner was the owner in fee of a lot in St. Joseph on which there was a two-story brick building which, during his ownership, had been used as a residence. On September 11, 1911, he entered into a written contract with defendant Minnie Dixon by the terms of which he sold her the property for \$30,000, and agreed to deliver her a deed on payment in full of the purchase price. She paid \$100 on the purchase price on signing the contract and agreed to pay the remainder in monthly installments. The contract provided that "in case of default in the payment of the above installments for ten days after any one of the same becomes due and payable as above provided (the vendee) shall forfeit this contract at the election of said Kallauner and all payments previously made hereunder shall be taken and considered as only rent for said premises."

Mrs. Dixon made no other payment but defaulted in the performance of the contract and on January 15, 1912, agreed in writing to the cancellation of the contract and surrendered possession of the premises to Kallauner who then sold and conveyed them to defendant Gambrel.

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Mrs. Dixon was in possession of the premises under the installment contract from September 11, 1911, to January 15, 1912, and while in such possession made alterations and repairs in and upon the building for the purpose of turning it into a rooming house with a restaurant on the first floor. These changes cost about \$900 and consisted in the main of painting, papering, removing some of the interior partitions, putting in new closets and bathrooms and laying some new flooring. The plumbing work amounting to \$443.50 was done by plaintiff under an oral contract with Mrs. Dixon who, in dealing with him, assumed to be the owner of the property.

There is evidence to the effect that Kallauner knew of the work at the time it was being done but there is no proof that he authorized Mrs. Dixon to act as his agent in having the work done and the contract did not mention the subject of improvement or repairs. Mrs. Dixon paid plaintiff \$173 on account of the work but failed to pay the remainder of the debt and the object of this suit is to establish and enforce a mechanic's lien against the building for the unpaid work and material furnished by plaintiff in the repair and alteration of the building.

A jury was waived and after hearing the evidence the court gave personal judgment against Mrs. Dixon in the sum due on the lien account and adjudged the demand a lien upon the building. Defendants appealed.

The action and the judgment do not attempt to subject to the lien any interest or estate in the land. Kallauner, the owner of the legal title, entered into no contractual relation with plaintiff either directly or indirectly. Mrs. Dixon was not his agent nor did his contract with her for the sale of the property authorize her to use his credit or the credit of his interest in the property as security for the work she had done on the premises. In instances where the owner

of the fee enters into a contract of sale or lease which invests the vendee or lessee with the right to enter into the possession of the premises and compels him to erect a building thereon or make improvements for the enhancement of the freehold estate, the agency of the vendee or lessee to subject the freehold to mechanic's liens will be implied. [O'Leary v. Roe, 45 Mo. App. 567; Lumber Co. v. Churchill, 114 Mo. App. 578; Hardware Co. v. Churchill, 126 Mo. App. 462.]

The present case is barren of such features and the mere fact that Kallauner knew that his vendee was having the building altered and repaired cannot be construed as conferring authority upon her in law to bind his estate in the land which, as stated, was the legal title.

The position of plaintiff is that since Mrs. Dixon, when she had the work done, was in possession of the premises, under a valid and binding contract of purchase, she had an equitable estate in the land that constituted her an owner within the meaning of the statutes. It is argued that "a person in the possession of property, under a contract of purchase, is such an owner or proprietor under the mechanic's lien law, that a contract made with such person, by a mechanic or material man, to furnish materials and erect a building thereon, or repair a building, already thereon, will afford a sufficient foundation for a mechanic's lien against the building so built or repaired and whatever interest such person has in the land."

The statute provides (Sec. 8212, R. S. 1909): "Every mechanic or other person, who shall do or perform any work or labor upon . . . any building, erection or improvements upon the land, or for repairing the same under . . . any contract with the owner or proprietor thereof . . . shall have for his work or labor done . . . a lien upon such building, erection or improvements and upon the land belonging to such owner or proprietor," etc.

The substance of plaintiff's position is that on the hypothesis that Mrs. Dixon was the owner of an estate in the land which afforded a foundation for a mechanic's lien, her contract for the alteration and repair of the building bound her estate in the land and the entire estate in the building including that of Kallauner, the holder of the legal title to both land and building. In support of this position we are cited to the following cases: [Jodd v. Duncan, 9 Mo. App. 417; Lumber Co. v. Clark, 82 Mo. App. 225 and 172 Mo. 588; Lumber Co. v. Harris, 131 Mo. App. 94.]

In the first of these cases a vendee in a contract of purchase entered into the possession of the land and with the knowledge of the vendor erected a building on the land. Afterward his contract of purchase was terminated and he lost all interest in the land. Mechanic's liens were filed against the building and were sustained by the St. Louis Court of Appeals in an opinion written by BAKEWELL, J., from which we quote as follows:

"One who has entered into possession under a contract to purchase, and who has erected buildings, may be regarded as an owner within the meaning of the mechanics' lien law, and as such, might, under the law, bind his equitable interest in the land. If the contract to purchase the land was not carried out, the expectation of title would fall; and the fact that the owner knew that the building was being erected and did not dissent ought not to be construed into an assent that the land should be chargeable with the lien. [Ph. on Liens, secs. 69-72, and cases.] The existing law under which this lien was filed provides, however (Rev. Stats. sec. 3174), that the lien shall attach to the buildings in preference to any prior lien on the land, and any person enforcing such a lien may have such buildings or improvements sold, and the purchaser may remove the same within a reasonable time. Such purchaser gets, of course, no interest in the land. The

right of enforcement is not confined to leasehold property, as has been expressly held in *Kansas City Hotel Company v. Sauer*, 65 Mo. 288. In every instance the improvements are regarded as the primary objects which confer the lien, and the land is added thereto where it belongs to the owner or proprietor. It seems to have been the intention of the Legislature, as is said by Judge NAPTON in *Smith v. Phelps*, 63 Mo. 588, to protect the title of the mechanic to a reimbursement for his expenditure in money or labor on the house he builds, by giving him a right to the house if all other means fail. We think the contract in the present case, having been made by one who erected the buildings under a contract to purchase the land, was made with the owner, within the meaning of the law; and though under the evidence no lien could be established against the land, since the contract of purchase was not carried out, the lien upon the buildings was not therefore lost, and the mechanic, on obtaining his judgment, might have sold them under execution, the purchaser, if other than the owner of the land, being obliged to remove them within a reasonable time."

In a similar case the Supreme Court say in *Lumber Co. v. Clark*, supra: "That it was the design of the statute to recognize as owner one who held the title, legal or equitable, which constituted him such under the rules applicable to conveyances of real estate, cannot be denied. The terms of the statute fully warrant this proposition, and such has been the construction uniformly given to it. [*O'Leary v. Roe*, 45 Mo. App. l. c. 572; *Jodd v Duncan*, 9 Mo. App. 417.] It is clear, therefore, that the contract made by appellant with Clark—who was then the equitable vendee of the land—was in the statutory sense a contract with one who was an owner or proprietor of the land."

We recognized and made application of these rules declared in the last two cases from which we have quoted so extensively and if we were dealing now with

a case where the owner of an equitable estate or interest in land while in possession thereof had built a new and independent building, erection or improvement thereon, we would not hesitate in holding that the entire structure though attached to the land in a manner to make it real and not personal property, nevertheless should be subjected to the liens of mechanics and materialmen and, if necessary, sold and removed from the land in satisfaction of such liens. Such interpretation of the statute does no violence to any canon of statutory construction, gives effect to the beneficent purpose of the mechanics' lien law and accords with plain requirements of justice and equity. Without impairing the estate the vendor contracted to convey it gives the lienors the security of the structure their labor and property helped to create.

But we are not confronted by a case of that character. Here the lienor is endeavoring to subject a part of the estate of the vendor, who, all along, retained the legal title, to a lien not founded on his express or implied contract and which cannot even be said to have enhanced the value of his estate. The alterations and repairs appear to have been necessary for the purpose of adapting the building to the special use the vendee decided to make of it, and there is no proof that they increased the value of the freehold by a single dollar. Consequently the position of plaintiff in its last analysis is that the estate of the vendor, of which the building was an integral part, may be subjected to a lien founded on a contract to which neither directly nor indirectly he was a party and which cannot be said to have been of any benefit to him. We think the mechanics' lien law should not receive an interpretation that would carve out an estate for the benefit of lienors in excess of that enjoyed by the owner with whom they contracted directly or indirectly. The cases we have reviewed do no such thing. They "render unto Caesar the things that are

Caesar's"—return to the vendor the estate and no more than he had when he entered into the contract of sale. They only give to the lienors that which thy put upon the land and which may be removed without great damage to the freehold but they do not compel the vendor to pay for something he did not order or desire on pain of being despoiled of a moiety of his estate. The respective rights of the vendor and lienors in cases of this character may be likened to those subsisting between lienors and a prior mortgagee. The statutes have been construed in such cases to give mechanics' liens priority to the mortgage, as to a building or improvement erected subsequent to the mortgage, for the reason that such enforcement of the lien cannot be said to be of substantial injury to the estate covered by the mortgage, but mechanics' liens for alterations and repairs or even for the reconstruction of a building on the land covered by the mortgage are subjected to the mortgage lien on the ground that no part of the mortgagee's estate should be taken from him under a contract to which he was a stranger. [See Schulenburg v. Hayden, 146 Mo. 583, where the subject is fully discussed and the authorities reviewed.]

We conclude that the estate covered by plaintiff's lien is bound by the estate Mrs. Dixon had in the land and building and since that estate has been ended and had no existence at the time this action was commenced, plaintiff has no legal remedy against the building.

The judgment is reversed. All concur.

ABNER MEYERS, Respondent, v. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, May 5, 1913.

1. **NEGLIGENCE:** Pleading: Specific Allegations. A plaintiff, who specifies in his petition the precise manner of his injury, will be held to his specifications and will not be allowed to recover on any different state of facts.
2. ——: Pleading: Evidence: Variance. Where a petition alleges the ditch or excavation where the accident occurred to be square across a passageway or footpath, and the evidence of plaintiff, introduced without objection, showed that the ditch was to one side in dangerous proximity to pedestrians using the passageway at night, there is no variance between the allegation and proof.
3. ——: Invitee: Duty of Railroad. One who goes upon the property of a railroad to transact business with the company, is an invitee and the company owes him the duty of reasonable care to keep the way free from snares and pitfalls, that might entrap the unwary traveler.
4. **INSTRUCTIONS: Witnesses: Comment Upon Testimony.** An instruction, which singles out plaintiff and comments upon his testimony is erroneous and has been repeatedly condemned by the Supreme Court.

Appeal from Platte Circuit Court.—*Hon. A. D. Burns,*
Judge.

AFFIRMED.

O. M. Spencer, H. B. Pyle and Guy B. Park for appellant.

(1) Under the pleadings and undisputed evidence the verdict was for the right party, and, whether the instructions were right or wrong, the verdict for defendant should stand. *Mockowik v. Railroad*, 196 Mo. 568; *Carr v. Railroad*, 195 Mo. 224; *Markowitz v. Railroad*, 186 Mo. 360; *Harmuth v. Railroad*, 129 Mo. 642;

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Vogg v. Railroad, 138 Mo. 180; Bartley v. Railroad, 148 Mo. 142; Fox v. Windes, 127 Mo. 514; Fitzgerald v. Barker, 96 Mo. 666; Orth v. Dorschlein, 32 Mo. 366. (2) And where under the pleadings and undisputed evidence, the verdict is for right party, the court should not grant a new trial for errors in instructions. Markowitz v. Railroad, 186 Mo. 360; Hormuth v. Railrcad, 129 Mo. 642; Kelly v. Railroad, 88 Mo. 534; Orth v. Dorschlein, 32 Mo. 366. (3) Where plaintiff alleges a specific act of negligence, only, he can recover on no other. Broadwater v. Railroad, 212 Mo. 437; Kirkpatrick v. Street Railway, 211 Mo. 68; Todd v. Railroad, 126 Mo. App. 684; Grisamore v. Railroad, 118 Mo. App. 387; Hufft v. Railroad, 222 Mo. 286.

Francis M. Wilson and *A. D. Gresham* for respondent.

No brief.

JOHNSON, J.—Plaintiff sued to recover damages for personal injuries he alleges were caused by negligence of defendant. The answer is a general denial. The jury returned a verdict for defendant but the court set it aside and granted a new trial on the ground of error in instructions numbered 1 and 2 given at the request of defendant. From this order defendant appealed and argues, first, that the instructions were not erroneous and, second, that regardless of the point on which the new trial was granted the judgment should be reversed and the cause remanded with directions to enter judgment for defendant for the reason that plaintiff failed to make a case to go to the jury and the court in refusing defendant's request for a peremptory instruction.

The injury of plaintiff occurred after dark in the evening of January 26, 1908, at a place in the town of Waldron near defendant's tracks which run past

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the town in a northerly and southerly direction. According to the evidence of plaintiff he was going to the express office maintained in defendant's station to inquire about an express package for his mother and was walking on a graveled path defendant had laid adjoining and parallel to the east track for the use of those who had business to transact at the station, when he took a step or two aside to avoid a passing train and fell in an unguarded hole defendant had allowed to remain on the east side of the pathway.

There was a switch stand at the place where plaintiff stepped aside and this stand was about four feet from the track and was on the east side of the graveled pathway. Plaintiff, thinking it too dangerous to pass between the moving train and the switch stand proceeded to pass around the outside of the obstruction, not knowing of the presence of the hole and not being able to see it on account of darkness. Defendant had built a new depot about 250 feet south of the old one and the point where plaintiff fell was in the space between the two buildings. There is a serious conflict over the question of whether plaintiff was at a place where he could be considered as the invitee of defendant or was where he could not be regarded in any other light than as a trespasser. His evidence tends to show that the office of defendant and the express office had been removed to the new depot and the graveled pathway had been opened to public use, while the evidence of defendant is to the effect that the offices still remained in the old depot and that no invitation express or implied had been extended to the patrons of defendant or of the express company to traverse the way between the two places. Indeed the evidence of defendant shows that the passageway had not been constructed at the time of the injury.

Among the points urged by counsel for defendant in their argument on the demurrer to the evidence is one to the effect that the evidence of plaintiff fails to

support the specific act of negligence pleaded in the petition. The allegation is that "defendant caused a ditch or excavation to be made square across said passageway or footpath" while the evidence of plaintiff shows that the ditch did not cross the pathway but was to one side in dangerous proximity to pedestrians using the passageway at night. The rule is well settled that a plaintiff who specifies in his petition the precise manner of his injury, will be held to his specifications and will not be allowed to recover on any different state of facts. This is on the ground that a defendant should not be brought into court to answer a specific charge of negligence and then be compelled to meet another and different charge at the trial. Defendant interposed no objection to the proof offered by plaintiff relating to the location of the hole, but accepted the issue tendered by his evidence as one comprehended within the specifications of the petition. We express no opinion on the subject of whether such conduct would relieve plaintiff from the burden of proving his pleaded cause, but we do hold that it calls for the most liberal interpretation of the petition that reasonably may be applied in aid of the cause of action. Reading the allegation we have quoted in connection with all of the facts stated in the petition and applying the friendly rule of construction by which we should be guided, we are brought to the conclusion that the real gist of the pleaded cause is the negligence of defendant in allowing a dangerous obstruction to remain in the course travelers might pursue while in the exercise of reasonable care and within the apparent scope of defendant's invitation. Defendant should have anticipated that invitees using the pathway at night would go around the switch stand to avoid passing between it and moving trains and should have put that way in a reasonably safe condition for their use. Broadly speaking the hole was in and across the path —the only apparently safe path—the invitation of de-

fendant offered to plaintiff, and we hold there is no fatal variance between allegation and proof.

Further it is argued that since the verdict was clearly for the right party it should stand, whether the instructions were right or wrong. This point is answered with the observation that it is based on defendant's view of the facts which is opposed by substantial evidence adduced by plaintiff. If, as that evidence tends to show, the express office had been removed to the new building and plaintiff in going there to transact business with the company was using a passageway over defendant's property which it had prepared for the use of those who had business at the station, he was an invitee and defendant owed him the duty of reasonable care to keep the way free from snares and pitfalls that might entrap the unwary traveler. His evidence shows a clear breach of that duty and was sufficient to take the case to the jury. Consequently we cannot say as a matter of law that the verdict clearly was for the right party. The demurrer to the evidence was properly overruled.

Counsel for plaintiff have not favored us with a brief and we do not know the ground on which the trial court held defendant's instruction numbered "1" to be erroneous. In substance, it directs a verdict for defendant on the finding by the jury that the new depot had not been opened for business, that the pathway to that building had not been opened to public use and that the business of defendant and of the express company was being transacted at the old depot. The evidence of defendant tended to show that such were the facts existing at the time of the injury and on this hypothesis plaintiff could not recover, since he was a trespasser on the property of defendant and not an invitee or licensee.

The courts make a distinction between a person who comes upon the premises of a railroad company on its invitation or for some purpose connected with

its business and one who uses the premises for his own convenience or pleasure. As to the first class of persons the company owes them the duty of reasonable care to protect them from injury while as to the latter, there is no such duty and the company owes such persons no higher duty than that of refraining from wantonly or wilfully injuring them. "A bare licensee (or trespasser) barring wantonness or some form of intentional wrong or active negligence by the owner or occupier, takes the premises as he finds them." [Glaser v. Rothschild, 221 Mo. 180. See also Ward v. Kellogg, 164 Mo. App. 81; Hufft v. Railroad, 222 Mo. 300, and cases cited.]

We find no error in the instruction under consideration.

The second instruction given at the instance of defendant is as follows: "The court instructs the jury that plaintiff was a witness in his own behalf; the jury are the sole judges of his credibility; all statements made by him, if any which are against his own interest must be taken as true; but his statements in his own favor are only to be given such credit as the jury under all the facts and circumstances in evidence deem them entitled to."

This instruction has been repeatedly condemned by the Supreme Court. [Zander v. Transit Co., 206 Mo. l. c. 461; Conner v. Railroad, 181 Mo. 397; Montgomery v. Railroad, 181 Mo. 477; Ephland v. Railroad, 137 Mo. l. c. 198; Huff v. Railway, 213 Mo. l. c. 515.] It is said in the case last cited: "Clearly this instruction is erroneous for two reasons: first, because it singles out plaintiff and comments upon her testimony; and, second, because it erroneously declares the law. Under this instruction if plaintiff through ignorance or mistake made a statement against her interest, the jury was bound under their oaths to take it as *absolutely true* whether it was in point of fact true or not. We know of no means by which a party litigant

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can be made to understand things any better while testifying upon the witness stand than he does while acting off of the witness stand; nor by which he can be prevented from making mistakes under oath the same as he does when he is not under oath.

"We have many times condemned that form of instruction, and it should never be given."

In the Zander case the court say that such instructions "are not to be tolerated." And in the case of Quinn v. Railway, 218 Mo. l. c. 556, that "it will not do to say that the giving of such an instruction does not work prejudice."

The error was prejudicial and justified the ruling of the court in setting aside the verdict and granting a new trial.

The judgment is affirmed. All concur.

J. N. FELLOWS, Respondent, v. GEORGE B.
DORSEY, Appellant.

Kansas City Court of Appeals, June 2, 1913.

1. **TAXBILLS: Pleading: Allegations.** A petition, in an action on taxbills, which alleges the facts required by the statute (Sec. 9296, R. S. 1909), is sufficient.
2. **—: Preliminary Resolution.** The preliminary resolution declaring it necessary that certain streets of a city of the third class should be paved, should substantially inform the public of the kind and character of improvement intended, otherwise the proceedings and taxbills will be invalid.
3. **—: Resolution: Publication.** A preliminary resolution for a public improvement published in a daily paper from June 27th to, and including, July 6th, except on June 28th, July 4th and 5th, is in full compliance with the requirements of Sec. 9255, R. S. 1909.
4. **—: Contracts: Delegation of Power by City Council.** A contract for street improvement which leaves to the determina-

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tion of the city engineer the time when the work should begin is not invalid. Such a provision is not an attempt by the city council to delegate a legislative duty to the engineer.

5. ———: Varlance Between Ordinance and Resolution: Contractor. Where a preliminary resolution for a public improvement provides that the gutter shall be grouted without further specifications, it is left to the council to provide the specifications; and if the specifications in the ordinance were faulty, the contractor is not at fault.
6. ———: Instructions: Definitions: Sand. An instruction, which undertakes to instruct the jury as to the meaning of the word "sand" as used in a contract for street improvement, is not erroneous.

Opinion on Rehearing by Trimble, J.

7. ———: Instructions: Custom and Usage. Upon rehearing it was held that the instruction given for plaintiff, which told the jury that if they believed the word "sand" meant sand that would go through a 20 sieve, then the contract has been complied with, was erroneous, there being no evidence that a 20 sieve would separate sand from gravel, while on the contrary there was evidence that it was not a proper sieve for this purpose.

Appeal from Boone Circuit Court.—*Hon. D. H. Harris*,
Judge.

REVERSED AND REMANDED.

W. H. Rothwell and *E. W. Hinton* for appellant.

- (1) The petition fails to state a cause of action for the reason that it fails to allege all of the necessary conditions precedent to a valid special assessment. *Irvin v. Devors*, 65 Mo, 625; *St. Louis v. Rankin*, 96 Mo. 497; *Joplin v. Hollingshead*, 123 Mo. App. 602.
- (2) The tax bill is void because the preliminary resolution failed to describe or specify the gutter work. *City of Bacon*, 144 Mo. App. 476; *Coulter v. Const. Co.*, 131 Mo. App. 230; *Barber v. O'Brien*, 128 Mo. App. 267; *Kansas City v. Asken*, 105 Mo. App. 84; *Kirksville v. Coleman*, 103 Mo. App. 215.
- (3) The tax bill was void because the preliminary resolution was

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not published for seven consecutive days. R. S. 1909, sec. 9255; *Mitchell v. Taylor*, 143 Mo. App. 683. (4) The tax bill for the work is void because the contract left it to the engineer to determine when work should begin, thus indefinitely delaying completion beyond a reasonable time. *Childers v. Holmes*, 95 Mo. App. 154; *McQuiddy v. Brannock*, 70 Mo. App. 535; *Ayers v. Schmohl*, 86 Mo. App. 349. (5) The tax bill is void because the contract and specifications depart from the preliminary resolution in providing for the construction of a worthless and unserviceable gutter. *City v. Bacon*, 144 Mo. App. 476. (6) The tax bill was void because the gutter specified in the contract was not reasonably suited to the purpose, and the city council had no power to make an unreasonable contract at the expense of the property owners. *Corrigan v. Gage*, 68 Mo. 541; *Springfield v. Jacobs*, 101 Mo. App. 339. (7) The court erred in giving the fourth instruction for plaintiff leaving it to the jury to determine the meaning of sand as used in the contract because it was for the court to construe the contract, in the absence of any evidence of a binding usage varying the meaning. *Rogers v. Modern Brotherhood*, 131 Mo. App. 353; *Martin v. Hall*, 26 Mo. 386; *Freight Co. v. Howard*, 44 Mo. 71. (8) The third instruction for the plaintiff invaded the province of the jury, and withdrew an important evidential fact from their consideration, by informing the jury that defendant must prove a substantial deviation from the contract, and that the subsequent condition of the street would not authorize them to find for the defendant, thus denying the right of the jury to infer bad execution from bad results. *State v. Salmon*, 216 Mo. 466; *James v. Ins. Co.*, 135 Mo. App. 247; *Imboden v. Trust Co.*, 111 Mo. App. 220. (9) The court erred in placing the ultimate burden of proof on the defendant to disprove substantial performance of the contract, because of the mere *prima facie* showing made by the tax bill. *State v.*

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Buck, 120 Mo. 497; Higgins v. Ry., 197 Mo. 300; Stone v. Perkins, 217 Mo. 600; People v. Cannon, 139 N. J. 132; Jones v. Bond, 40 Fed. 281.

W. M. Williams and *McBaine & Clark* for respondent.

(1) Plaintiff's petition states a cause of action. Cushing v. Powell, 130 Mo. App. 177; Paving Co. v. Bath, 136 Mo. App. 555; Const. Co. v. McCormick, 157 Mo. App. 198; Robinson v. Levy, 217 Mo. 498. (2) The preliminary resolution does not fail to sufficiently describe the gutter work. Sec. 5859, R. S. 1899, and Laws of 1907, p. 103; Muff v. Cameron, 134 Mo. App. 607; Walker v. Chicago, 202 Ill. 531, 67 N. E. 369; Gage v. Chicago, 69 N. E. (Sup. Ct. Ill.) 588; McLannon v. Chicago, 218 Ill. 62, 75 N. E. 762; Gage v. Chicago, 237 Ill. 328, 86 N. E. 633; Gage v. Chicago, 225 Ill. 218, 80 N. E. 127. (3) The preliminary resolution was published as required by Sec. 5859, R. S. 1899. Porter v. Pav. & Const. Co., 214 Mo. 1; Mexico v. Lakenan, 129 Mo. App. 180; Rosmussen v. People, 155 Ill. 70, 39 N. E. 606. (4) The time within which the work was to be completed was not left to the discretion of the engineer, and the work was completed in a reasonable time. Halsey v. Richardson, 139 Mo. App. 157; Allen v. Lab-sap, 188 Mo. 692. (5) The contract and specifications called for the construction of the kind of a street prescribed in the preliminary resolution. There is no departure. The street is not worthless. The fault with the gutter is due to lack of proper drainage upon the street. (6) The fact that the city specified a gutter that was not a suitable gutter for the street improved will not defeat the contractor's right to recover on his tax bills issued for paving the street. Heman v. Ring, 85 Mo. App. 231; Heman v. Franklin, 99 Mo. App. 346; Skinker v. Heman, 148 Mo. 349. (7) Instruction 4, given for the plaintiff does not constitute error. Realty Co. v. Monihan, 179 Mo. 629; Evans v.

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Mfg. Co., 118 Mo. 553. (8) The trial court did not commit error in giving instruction 3 offered by plaintiff and this instruction was not a comment upon the evidence. *Tyler v. Hall*, 106 Mo. 323; *Nichalson v. Golden*, 27 Mo. App. 132. (9) The burden of proof is on the defendant to show that there was not substantial performance of the contract. *Bank v. Ridge*, 183 Mo. 518; *Moberly v. Hogan*, 131 Mo. 23; *Excelsior Springs v. Ettenson*, 120 Mo. App. 215; *State ex rel. v. Phillips*, 137 Mo. 259, 264; *State ex rel. v. Vogelson*, 183 Mo. 17, 22; *Paving Co. v. Bath*, 136 Mo. App. 555. (10) The trial court did not commit error in giving plaintiff's instruction 7. The instruction follows the language of the specifications and puts the issue as to whether the work was done according to the specifications squarely to the jury. (11) Respondent concedes that the judgment should bear six instead of eight per cent; this court should therefore modify the judgment, but the case should not be reversed on that account. *Boonville v. Stephens*, 141 S. W. 1111. (12) Defendant's answer was a general denial and there was therefore nothing before the court but the validity of the tax bills, and as they were regular and valid the judgment below should be affirmed. *Carthage v. Badgley*, 73 Mo. App. 123; *Vieth v. Planet Co.*, 64 Mo. App. 207; *Bank v. Shewalter*, 153 Mo. App. 636; *Bambrick Bros. v. McCormick*, 157 Mo. App. 198.

BROADDUS, P. J.—This is a suit to enforce the collection of a special tax bill issued to the contractor J. N. Fellows, for grading and macadamizing Anthony street in the city of Columbia, a city of the third class. The petition contains allegations to the effect that on the 15th day of June, 1908, the city council adopted a resolution declaring the necessity for the work; that due publication of the resolution was made; that the council duly passed an ordinance for the grading and macadamizing of the street; that, in pursuance of the

said ordinance, plaintiff entered into a contract on the 8th of August, 1908, with the city to do the work provided in said resolution and ordinance for the sum of \$3254.568; that he duly performed said contract, and made the improvements by grading, paving and curbing said street; that said work was duly accepted by the council, and assessment for the cost of the work was made by an ordinance levying a special assessment for said improvement and authorizing the tax bills therefor; that the city caused the total cost of the work to be assessed against the lots and tracts of land fronting and abutting on either side of said street in proportion to the front foot, etc., and did cause tax bills to be issued therefor in payment to the plaintiff as such contractor. It is alleged that the tax bill in suit, which was for \$603.395, was the proportionate part charged against the property of defendant, and then follows a description of the tax bill, which is filed. The answer was a general denial.

On the 15th day of June, 1908, the city council passed a resolution declaring it necessary to grade, pave, curb and gutter Anthony street. The grading, curbing and macadamizing were described in detail. The street was to be twenty-two feet from curb to curb. A sublayer of macadam, five inches deep, was to be laid from gutter line to gutter line, prescribing the materials to be used. Upon this was to be laid a four inch course; no stone to be used whose greatest dimensions exceed one and one-half inches. Upon this layer was to be laid a top course of screened gravel containing about fifteen per cent sand, and no stone which shall exceed one inch in its greatest diameter. . . . "The last course to be grouted twenty-four inches from each curb to form a gutter. On each side of the street shall be constructed, a concrete curb five inches wide and sixteen inches in depth."

The specifications for the gutter were as follows: "Gutter to be formed by grouting the top course a

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distance of twenty-four from each curb to form a gutter. Grout to be made of one part Portland cement and six parts clean sand. It being understood that the depth of courses of material above described indicates depths before rolling."

On the 16th day of March, 1909, the contract was let to plaintiff for the performance of the work according to the plans and specifications. On the 4th day of January, 1910, the work was reported completed, and the council then passed the ordinance levying special tax bills for the work, including that of the defendant.

The time for the completion of the work was fixed at ninety days from the date on which the engineer notified the contractor to begin work. It was provided that: "Should the contractor fail to complete the work to the satisfaction of the engineer, within the time specified, then there shall be withheld from the money due him on his final estimate, a sum of money equal to ten dollars per day for each and every day of such delay."

The principal controversy was whether the contractor complied with the specifications as to the guttering. It was shown that the contractor made a mixture for the gutter and spread it for the required width on top of the last course, which made a soft mortar crust to form the gutter. The evidence tended to show that this mixture became dust and was blown or washed away. The result was that the gutter washed out in ditches, and some of the curbing fell.

As to the composition of the top course, there was evidence on the part of the defendant that it was not screened, but varied from stones as large as a man's fist to small particles, and that there was more sand than gravel. And that the work was not done in a good workmanlike manner. On the other hand, plaintiff's evidence tended to rebut that of the defendant as to that matter, also that the mixture was according to the

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specifications, and showing by standard authority the meaning of the word "sand." Also, there was evidence tending to show that the cause of the washing of the gutter was that it was overburdened with excessive drainage.

The court, in various instructions, told the jury, substantially, that if the work done by the plaintiff complied with the specifications he was entitled to recover on the taxbill, notwithstanding they might believe the gutters were washed away, or that the street subsequently became in bad condition and out of repair. Other evidence will be referred to hereafter.

By instruction No. 4 the court defined what the word "sand" meant in the contract. It is as follows: "The court instructs the jury that if you find and believe from the evidence that the term 'sand' as used in the contract and specifications for Anthony street means that material that will pass through a number twenty sieve which is a sieve containing twenty meshes to the inch, and if you further find and believe from the evidence that the plaintiff, the contractor, in putting on the top course on said street, used material which contained about fifteen per cent sand, according to the above test, then you must find that as to the top course that the plaintiff did said work according to the contract and the specifications therefor."

The defendant asked an instruction placing the burden of proof upon the plaintiff, which the court refused; and one to the effect that if the gutter constructed "was worthless and wholly unserviceable," the finding must be for the defendant, which the court also refused. And one also to the effect that "the work contracted for must be reasonably adapted to the purpose," etc. This was also refused.

Upon the question of the burden of proof the court gave instruction No. 3 at the instance of plaintiff. It is as follows: "The jury are instructed that the acceptance by the city council of the city of Colum-

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bia of the work done by the plaintiff on Anthony street and the issuing to him of the tax bills read in evidence, raised the presumption that the improvement on Anthony street was constructed of the material and in the manner prescribed by the contract, plans and specifications read in evidence, and before the defendant can avoid the payment of said tax bills it devolves upon him to show by the greater weight of the evidence that there was a substantial deviation from the plans and specifications in doing said work and the mere fact that gutter or gutters were washed away or that the street subsequently became in bad condition and out of repair, will not invalidate the tax bills or authorize the jury to find for the defendant."

The plaintiff recovered for the amount of the tax bill with eight per cent interest. The defendant appealed.

It is insisted that the petition does not state a cause of action. It seems that defendant bases his contention upon the theory that all the steps taken by the council and other matters for doing the work by the contractor are not set forth in the petition.

The city of Columbia being a city of the third class, the pleading in question is to be construed with reference to section 5891, Revised Statutes 1899, now section 9296, Revised Statutes 1909. The section provides that: "It shall be sufficient for the plaintiff, in any suit on such special tax bill, to plead the making of the tax bill sued upon, giving the date and contents thereof, and the assignment thereof, if any, and to allege that the party or parties made defendant own, or claim to own, the lands charged, or some estate or interest therein, as the case may be, and to file the tax bill in suit." And, "Every tax bill shall, in any suit thereon, be *prima facie* evidence of the validity of the bill, and of the doing of the work and of the furnishing of the material charged for, and of the liability of the land to the charge stated in the bill."

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The petition states all the facts required by the statute. We have examined with some care the cases cited by defendant to sustain his theory, and are free to say that we do not think they apply. The question has often been before the courts, and the holding has been uniform that a petition, alleging the facts required by the statute, is sufficient. And we do not see how it could be otherwise, unless the statute should be disregarded. [Cushing v. Powell, 130 Mo. App. 576; Paving Co. v. Bath Co., 136 Mo. App. 555; Bambrick Bros. v. McCormick, 157 Mo. App. 198.]

The validity of the tax bill is challenged on the ground that the preliminary resolution for doing the work failed in specifications.

The rule is stated to be that: "The resolution of the city council providing for street improvement should state directly or by reference the nature and character of the improvements, otherwise the proceedings are without jurisdiction and the tax bills issued would not be valid." [City of Poplar Bluff v. Bacon, 144 Mo. App. 476; Coulter v. Construction Co., 131 Mo. App. 230.] "The preliminary resolution declaring it necessary that certain streets of a city of the third class should be paved, etc., should substantially inform the public of the kind and character of improvement intended; otherwise the proceedings and tax bills will be invalid." [City of Kirksville v. Coleman, 103 Mo. App. 215.] In that case the resolution declared that, "it is deemed by said council necessary to improve Brown avenue . . . by grading, paving, guttering, curbing and terracing the said avenue," and there was no mention directly or indirectly of the kind of paving.

The statute does not require any particular description of the work to be done in such cases, it only requires that the city council shall, "by resolution declare such work or improvements necessary to be done." [Sections 5859 and 5860, R. S. 1899.] How-

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ever, it necessarily implies that there should be some description of the nature and character of the work. It does not mean, however, that it should be specifically described. The character of the work and the nature of the material will answer the purpose of the statute. The case of *Muff v. City of Cameron*, 134 Mo. App. 607, and authorities cited, we believe, are conclusive on the question. We think the resolution is sufficiently explicit as to the guttering. It is to be grouted. Grouting consists of the proper proportions of sand, stone and cement. Every property owner to be affected knew what the resolution meant, and such is the only purpose of the statute.

The statute requires that the council shall "cause such resolution to be published in some newspaper printed in the city for two consecutive insertions in a weekly paper, or seven consecutive insertions in a daily paper." [R. S. 1909, sec. 9255.] The publication was made in a daily paper. There were three gaps in the publication; the first publication was on June the 27th and the last on July the 6th, leaving a gap on June 28th, July 4th and 5th. It is conceded that a paper published six days a week without a Sunday edition is a daily paper within the meaning of the statute, and the continuity would not be broken by the lack of a Sunday edition but, as there were not three Sundays between June 27th and July 6th, there was an omission of one work day. In *Porter v. Boyd Pav. Co.*, 214 Mo. 1, it was held, where the publication was to be for ten successive days and the publication was omitted on two Sundays occurring within the time, that the publication was sufficient. The court said: "'Ten successive days' means publication on ten successive days when the paper can be published without the publisher running the risk of being indicted for a violation of the Sunday statute of the State." And such is the holding in *Mexico v. Lakenan*, 129 Mo. App. 180.

It was shown that the paper was not published on Sundays or on the Fourth of July. As the Fourth of July was a holiday under the statute, and the publisher could not compel his employees to work on that day, we see no good reason why the same rule should not govern as that applied to Sundays.

As the time when the work should begin was left to the determination of the engineer, defendant asserts that it operated in indefinitely delaying the completion of the work beyond a reasonable time.

A city council cannot delegate to the city engineer the power to extend the time for the completion of a contract for street improvement. [Childers v. Holmes, 95 Mo. App. 154; McQuiddy v. Brannock, 70 Mo. App. 535; Ayers v. Schnohl, 86 Mo. App. 349.] But it is held that such a provision in a contract of this kind was not an attempt to delegate a legislative duty to the city engineer to delay the beginning and completion of the improvement beyond a reasonable time from the approval of the ordinance. [Halsey v. Richardson, 139 Mo. App. 157, and cases cited.]

It is contended that the contract and specifications are not in conformity to the preliminary resolution because it provided for the construction of a worthless and unserviceable gutter. If there was a difference between the resolution and the specifications in the ordinance and contract as to the work and material that went into the construction of the gutter, the ordinance was void, and the tax bill invalid. [City of Poplar Bluff v. Bacon, *supra*, and cases cited.] But it does not appear that the provision in the ordinance was a departure from the resolution. The latter provided for grouting without further specifications, and it was left to the council to provide the specifications. If the specifications in the ordinance were faulty and not reasonably suitable for the purpose, it was not the fault of the contractor, in the absence of fraud or collusion. He was bound by his contract to conform to

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the provisions of the ordinance, otherwise the tax bills would be invalid. The discretion was vested in the council to provide the specifications for the construction of the gutter, and it was not for the contractor to dictate to the council the method of doing the work. It is said, substantially, where the ordinance is valid in its general scope, and does not show on its face fraud or caprice in its enactment, and is suitable to the subject-matter to which it is applied, the fact that it is inapplicable to defendant's property and imposed a burden on him, without any corresponding benefits to him or his community, cannot for the first time be interposed as a legal defense in a suit on a tax bill for work done under the ordinance. [Herman v. Ring, 85 Mo. App. 235.] "It would be unjust to a contractor who has completed an improvement in full compliance with a contract awarded him by the board of aldermen, which is within the general powers conferred upon it, to refuse payment for the simple reason that the courts may conclude that the means or methods adopted by the board were not the best or cheapest." [Warren v. The Barber Pav. Co., 115 Mo. 572, and cases cited.]

The court, in instruction No. 4 given for plaintiff, undertook to instruct the jury as to the meaning of the word "sand" as used in the contract. The plaintiff was also permitted to introduce evidence as to the technical meaning of "sand."

A construction of the meaning of the language of a contract, as a general rule, is a matter for the court. The word "leg" has a well-defined common meaning and should not be controlled by the meaning placed on it by specialists. [Rogers v. Modern Brotherhood of America, 131 Mo. App. 353.] In ordinary parlance, we all understand what is meant by the word "sand," that is, a composition in which sand predominates. But when it comes to apply the term to ingredients used for building purposes, such as plastering or concrete, it should and does have a technical meaning, because

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sand taken from different deposits contains different proportions of other matter such as dirt and stone. [Snoqualmi v. Moynihan Co., 179 Mo. 629.] In such cases, the custom fixing the standard of the quality of a thing prevails. [Evans v. Western Bros. Mfg. Co., 118 Mo. 548.] We do not think the instruction was a comment on the testimony.

It is urged that the court erred in placing the ultimate burden of proof upon the defendant. The following cases are referred to in support of this contention: Cushing v. Powell, 130 Mo. App. 576; Chillicothe v. Henry, 136 Mo. App. 468; Poplar Bluff v. Bacon, *supra*; Fruin v. Meredith, 145 Mo. App. 586. In Cushing v. Powell, *supra*, where the question was one of pleading, it is held that, where the declaration counts on a tax bill, a general denial admits any evidence which may show that the necessary preliminary proceedings never ripened into a valid tax bill; and the provision of the statute making the tax bill itself *prima facie* evidence of its validity cannot affect the rule.” And such is the holding in Chillicothe v. Henry, *supra*, and Poplar Bluff v. Bacon, *supra*. The other cases cited have no application.

On the other hand, it is held that a tax bill is *prima facie* evidence of the regularity of the proceeding and the liability of the property to be charged, and the burden is upon defendant to overcome the *prima facie* effect. [Excelsior Springs v. Ettenson, 120 Mo. App. 215; Savings Bank v. Ridge, 183 Mo. l. c. 518; Moberly v. Hogan, 131 Mo. 19; State ex rel. v. Phillips, 137 Mo. 259.] The principle seems to be well settled in this State.

Many other errors are insisted on by the appellant, but the most of them are unimportant, and others have been so often determined by the appellate courts that it is useless to discuss them. The cause was well tried.

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The judgment provides that it shall bear eight per cent interest. This is error. It only bears six per cent. But, as the matter was not called to the attention of the court in the defendant's motion for a new trial, the cause should not be reversed, but the judgment modified in that respect. [Boonville v. Stephens, 141 S. W. 1111.] The judgment is modified so that it bears six per cent interest from date of rendition and the cause is affirmed. All concur.

ON REHEARING.

TRIMBLE, J.—A rehearing was granted herein on November 25, 1912, and the cause was, at the present term, again argued and submitted. At this second hearing the point was urged, more clearly and forcibly than before, that the trial court erred in giving for plaintiff instruction No. 4. It is copied in full in the original opinion.

The resolution declaring the work necessary to be done, and also the ordinance authorizing it, after specifying the various materials which should enter into the building of said improvement and the method of its construction, contained this provision: "Upon this layer is to be laid a top course of *screened gravel* containing about fifteen per cent sand, and no stone of which shall exceed one inch in its greatest diameter."

The defense, or rather one of the defenses, was that the work was not done in substantial compliance with the specifications. Evidence was introduced by defendant that screened gravel was not used, but that sand was; that sand largely predominated; that instead of there being only fifteen per cent of sand, there was at least from sixty to sixty-five per cent sand in this top course; that consequently it quickly washed away. The defendant, who was one of the witnesses who so testified, when cross-examined, said he did not know the proportion of sand and gravel used in the

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top course but that, from observation as one would look to see whether it was sand or gravel, it could easily be seen that the sand largely predominated, and that the gravel had not been screened. Another witness for defendant, J. H. Guitar, swore he selected several representative samples from different parts of the street and separated the sand from the gravel by means of an ordinary sifter used in brick work, and that, by weight there was from sixty to sixty-five per cent sand in the top course, and that screened gravel was not used.

Plaintiff testified that he screened the gravel for the top course so as to take out all stone larger than one inch in diameter; and that he *tested* the gravel with a number twenty and number eighteen sieve (that is, sieves with twenty and eighteen meshes each way to the inch respectively) and that it tested fifteen per cent sand; but that the only *screening* he did was to run it through a coarse screen to take out the big rocks. To meet the testimony offered by defendant that there was from sixty to sixty-five per cent sand in the top course, plaintiff introduced an expert, Hyde, who testified that "sand is known as any hard, granular rock material that has been reduced to particles and these particles being larger than dust and smaller than pebbles." He further testified that the method for determining whether or not a material was "standard sand" was the sifting or fineness test; that "standard sand" *used in making mortar*, is defined, by the American Society for Testing Materials, to be sand that will pass through a twenty sieve and be caught on a thirty sieve. On cross-examination he testified that sand was treated to this test, *not to separate sand from gravel*, but to see whether the sand in question would *make a poorer or better mortar than standard sand*. He also testified that the twenty sieve would be used not to screen the gravel but to test various samples of sand. He was then asked:

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"Q. But you would not use a twenty sieve practically to screen sand out of gravel at the pit? A. No, I don't think you would.

"Q. That is not the sort of a sieve they use for screening gravel? A. Unless they wanted to find out what they have got at the bank, in which event they certainly would get a standard sieve.

"Q. The standard sieve is used for testing purposes and not for the work of separating the sand from gravel? A. It depends upon what you want to use it for.

"By the Court: Q. Does the contractor use such a sieve as you have described in his actual work? A. If it is specified that he would use a twenty sieve, he would.

"By Mr. Hinton: Q. If no sieve was specified, is that the practical sieve used for screening gravel, a twenty sieve? A. *No, I should say not.*"

The sand and gravel for the top course of the improvement in question was obtained from a gravel pit. A number twenty sieve is one with twenty meshes to the inch each way, or 400 to the square inch. It would hardly require technical knowledge to understand that if, to screen it, gravel and sand are thrown against such a sieve, too much sand would be retained in the gravel; and that, as Hyde says, a twenty sieve is not a practical or even a proper sieve to screen gravel, especially if the gravel must not contain over fifteen per cent sand or about that. The number twenty sieve is used to test the degree of fineness of sand, or to obtain sand of a particular grade of fineness, known as "standard sand," but not to obtain *gravel* of a certain standard or quality. Much confusion and vagueness of thought will be avoided if we bear in mind at all times that, in the specifications and contract involved herein, the material dealt with was not *sand* but *gravel* of a certain standard and quality. There

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was no mention in the contract of the particular grade of sand, nor that a number twenty sieve was to be used. The words "gravel" and "sand" therefore were used in the contract in the commonly accepted sense of those terms. And it was gravel not larger than one inch in diaemter and containing fifteen per cent sand that was to be used. The preliminary resolution specified the same kind of gravel. This resolution is for the information of the nontechnical property owner, and the words used therein must be given their usual and ordinary meaning unless it clearly appears from the context that a different meaning was intended. As a matter of common sense, gravel for road building does not mean a material indistinguishable from sand except by some scientific test known only to the technical professional man. If the contract for building the improvement is to be governed by a technical definition as to what constitutes a certain grade of sand, then it could be strictly complied with by using material which could not be distinguished from sand by sight or touch and which differed from sand only by that degree of fineness represented by the difference between a twenty sieve and a smaller one. But, as shown by Hyde's definition, as well as by his testimony, a number twenty sieve does not differentiate sand from gravel but only sand of one degree of fineness from sand of another degree of fineness. And this agrees with the ordinary and usual distinction between gravel and sand. The former means "small stones, or fragments of stone, very small pebbles, often intermixed with particles of sand." [Webster's International Dictionary.] (In the case before us these stones must not be larger than one inch in diameter, and the sand intermixed therein must be about fifteen per cent.) The same authority defines sand as being "fine particles of stone but not reduced to dust; comminuted stone in the form of loose grains, which are not coherent when wet." So that, inasmuch

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as it is screened gravel, containing a certain proportion of sand, which is the material under investigation, and not sand of a particular kind or quality, it would seem that, aside from any decisions in the books, it would not be proper to tell the jury that the contractor has fully complied with his contract if they find that he has used material which contained about fifteen per cent sand of a certain degree of fineness only. And this is in effect what instruction No. 4 does. But, if authority from the decided cases is needed, it is certainly true that the construction of the meaning of the contract is for the court and not an issue of fact for the jury. "Parties contracting are supposed to use the language in its commonly accepted sense, and courts and juries do not require the aid of experts to tell them what such language means. The learned trial judge . . . should have ascertained its meaning from the language of the contract and instructed the jury accordingly." [Rogers v. Modern Brotherhood, 131 Mo. App. 353.] Of course, if a usage or custom of a trade enters into and affects the construction of a contract, this may give words of an otherwise ordinary meaning a technical definition; but such usage or custom must be so general and well established as to raise the presumption that the parties had knowledge of it and contracted with reference to it. And the party claiming such usage must prove it. [Martin v. Hall, 26 Mo. 386. See also Southwestern Freight Co. v. Howard, 44 Mo. 71, l. c. 82.] No such custom was shown herein. Indeed, it would seem from Hyde's testimony that there was no such custom since he testified that the sieve used was not the sieve to use in obtaining screened gravel.

It is urged that defendant first brought this test, for determining what was sand, into the case by introducing the witness, J. H. Guitar, who testified to his use of a No. 8 sieve for this purpose, and hence defendant having adopted the same theory and having

first invited it, he will not be allowed to change on appeal. But Guitar did not use the sieve to determine what was sand and what was not, but to separate the sand from the gravel so that he could weigh each separately and determine by weight what was the proportion of each. Of course, this would in a measure determine what was sand and what was gravel. But it did not authorize the use of a sieve which would only screen out the finer grades of sand and leave a larger proportion of coarse sand than was permissible and which was not gravel. Besides, if this did introduce the sieve test as a means of determining what was sand and what was gravel, still this did not authorize the court to tell the jury that if they believed the word "sand" meant sand that would go through a twenty sieve, then the contract had been complied with. There was no evidence that a twenty sieve would separate sand from gravel. On the contrary, there was evidence that it was not the proper sieve for this purpose. It may be that it requires evidence to show the proper sieve for determining what is sand and what is gravel, but if so, the question what sieve is proper should be submitted, instead of telling the jury that, if they believed the contract meant a certain grade of sand, and a sieve was used which would pass that grade and that the gravel contained about fifteen per cent of that grade only, then they must find that the contractor did his work according to contract.

In view of the foregoing we are of the opinion that the instruction is erroneous. The judgment is reversed and the cause remanded for a new trial. All concur.

FRANKLIN MOTOR CAR COMPANY, Respondent,
v. FRED J. KAST, Appellant.

Kansas City Court of Appeals, June 2, 1913.

1. CONTRACTS: Wilful Abandonment: Quantum Meruit: Measure of Recovery. Where one party to a contract wilfully abandons it, or prevents the other party from fully performing, such other party may also abandon it and sue in *quantum meruit*, and recover the reasonable value of his service; and in such case he is not confined to the compensation stated in the contract.
2. ____: ____: ____: Automobile: Sale: Contract: Compensation. A person owning an automobile desired to sell it and purchase a new one. He agreed with a dealer in such machines that if the latter would sell his old one, the dealer could sell him a new one. The dealer sold the old one, whereupon the man refused to permit the dealer to sell him a new one—refused to purchase. The dealer thereupon brought his action in *quantum meruit* for the value of his services in selling the old machine. It was held that his action was well brought and that the value of his services was not to be confined to the compensation named in the contract—that is, the profit in a sale of a new machine.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

AFFIRMED.

William B. Yoder and H. H. McCluer for appellant.

(1) The court erred in not giving appellant's instruction, directing the jury to find the issues in his favor. 1 Chitty on Contracts, 89; Mill Co. v. Blundage, 25 Mo. App. 268; Houck v. Bridwell, 28 Mo. App. 644-649; Smith v. Taylor, 20 Mo. App. 166; Sublett v. McLin, 29 Tenn. 181; 2 Greenleaf on Evidence, sec. 104; 9 Cyc. 690; Robert v. Wilson, 34 Mich. 139. (2) The court erred in admitting evidence as to the reasonable value of plaintiff's services.

Percy C. Field for respondent.

(1) Plaintiff may waive contract and sue in *quantum meruit*, where the acts of defendant prohibit plaintiff from completing the contract. McCullough v. Baker, 47 Mo. 401, 88 Mo. 257, 19 Mo. App. 556, 23 Mo. App. 653, 33 Mo. App. 443, 36 Mo. App. 580, 76 Mo. App. 526, 113 Mo. App. 98; Hunt v. Test, 8 Ala. 713, 42 Am. Dec. 659; Prince v. Thomas, 15 Ark. 378; Bridge Co. v. Dumbarton Co., 119 Cal. 272, 51 Pac. 335; Adams v. Pugh, 7 Cal. 150; Reynolds v. Jourdan, 6 Cal. 108; Guerdon v. Corbett, 87 Ill. 272; Sanger v. Chicago, 65 Ill. 506; McPherson v. Walker, 40 Ill. 371; Angle v. Hanna, 22 Ill. 175; Webster v. Enfield, 10 Ill. 298; Bannister v. Read, 6 Ill. 92; Butts v. Huntley, 2 Ill. 410; Kipp v. Massin, 15 Ill. App. 300; Hoagland v. Moore, 2 Blackf. 167; Crammer v. Graham, 1 Blackf. 406; Brown v. The Laura Snow, 14 La. Ann. 848; Wright v. Haskell, 45 Me. 489; Davenport v. Hallowell, 10 Me. 317, 2 Md. 38; Johnson v. Trinity Church Soc., 11 Allen 123. (2) A plaintiff wrongfully prevented from completing his contract is entitled to recover such compensation as his service is reasonably worth. McCullough v. Baker, 47 Mo. 41; Cyc., p. 688; 27 Mo. 516, 65 Mo. 551, 188 Mo. 257, 127 Mo. 523, 54 Mo. App. 341, 111 Mo. App. 182, 113 Mo. App. 586, 41 Mich. 108, 128 Mass. 234, 102 Mo. App. 422, 420, 107 Mo. App. 7, 101 Mo. App. 195.

ELLISON, J.—Plaintiff's action was begun before a justice of the peace by filing the following account:

"To commission on sale of model H. D. Maxwell automobile to C. L. Eggert, sale made about November 15, 1909—\$90."

On appeal to the circuit court, plaintiff had judgment.

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The evidence showed that defendant was the owner of an automobile and wanted to buy a new one if he could sell the one he had. Plaintiff was a dealer in automobiles and defendant made a verbal contract with him whereby he, defendant agreed that if plaintiff would sell the old machine defendant would buy a new machine of him. Plaintiff in carrying out this contract thereafter sold the old machine, but defendant failed to abide by his part of the contract by refusing to buy a new machine of plaintiff.

The sole defense is that plaintiff's action should have been for damages by reason of defendant refusing to carry out his contract. Or, if the action be on a *quantum meruit*, the contract consideration would limit the amount of recovery.

But in this case it will be observed that defendant, after part performance by plaintiff, abandoned the contract by refusing to allow him to complete it by selling him a car. In such case plaintiff has two remedies: He may sue for the breach and recover damages, or he may himself abandon the contract and recover on *indebitatus assumpsit*; the reasonable value of his service. [McCullough v. Baker, 47 Mo. 401.] If a party plaintiff under special contract has performed service for another which has been received and is of value to the latter and the plaintiff has failed to fully comply with the contract, yet he may recover on *quantum meruit*, not to exceed the contract price, and less any damage for his failure. [Yeats v. Ballentine, 56 Mo. 530.] "But one may have the remedy *quantum meruit*, when his adversary, and not he, prevents full performance of a contract and is, therefore, in fault. If a party is prevented from completing his part of an agreement by the obligee, he may, if he chooses, treat the contract as abandoned and sue for what he had done already towards performance, instead of seeking damages on the contract for breach:" Goode, J., in Cann v. Rector, etc., 111 Mo. App. 164, 182.

Where one party to the contract prevents performance by the other, the latter may sue in *quantum meruit*; and in such case the amount of his recovery is not limited to the compensation named in the contract. [Morrill v. Ithaca & Oswego Ry., 16 Wend. 586.] The party not at fault may treat the contract as abandoned and sue on common counts, in which case he will not be confined in his recovery to the contract price. [Clark v. Mayor of New York, 4 Comst. 338; Chamberlin v. Scott, 33 Vt. 80.] These cases are cited and relied upon by the Supreme Court in McCullough v. Baker, *supra*.

We think authorities cited by defendant not applicable to the case made, and that the trial court's view was correct. The judgment is affirmed. All concur.

L. A. BOATRIGHT, Appellant, v. J. H. KAYLOR,
Respondent.

Kansas City Court of Appeals, June 2, 1913.

1. **FRAUDULENT REPRESENTATIONS: Reliance: Opportunity for Inquiry.** Where one charges that another fraudulently and falsely represented to him that two acquaintances, living in the same town, had subscribed and paid for stock in a mining lease and that he, on the faith of that representation, subscribed and paid for \$200 worth without making inquiry of the acquaintances, it is enough to excite distrust in the mind of the chancellor whether he relied upon and was influenced by the representation.
2. _____: _____: _____: Record: Evidence: Affirmance. Where the record fails to show that the chancellor's finding for defendant was based upon any particular branch of the case, or part of the evidence, the defendant is entitled to an affirmance on any theory which the evidence will justify.

Appeal from Vernon Circuit Court.—*Hon. B. G. Thurman, Judge.*

AFFIRMED.

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Scott & Bowker for appellant.

(1) In order to defeat a court of equity of jurisdiction on account of there being an adequate or concurrent remedy at law, the remedy at law must be as full, complete and adequate as that in equity. *Barrington v. Ryan*, 88 Mo. App. 85; *Hanson v. Neal*, 215 Mo. 256. (2) The frauds complained of in this case are sufficient to justify a court of equity in setting aside this judgment. *Wonderly v. Lafayette Co.*, 150 Mo. 635; *Howard v. Scott*, 216 Mo. 685; *Mangold v. Bacon*, 237 Mo. 496.

W. H. Hallett for respondent.

(1) Where appellant, in a suit in equity, has failed to bring up on appeal all the evidence, the facts will not be reviewed. *Mason v. Smith*, 124 Mo. App. 596; *McKinney v. Northcut*, 114 Mo. App. 146; Rule 14 of this court. (2) Where the evidence introduced is conflicting, an appellate court will not, even in a suit in equity, say which side has the preponderance of the evidence, but will defer to the finding of the trial court. *Culberson v. Hill*, 87 Mo. 553; *Dobbins v. Humphreys*, 171 Mo. 198; *Weller v. Wagoner*, 181 Mo. 151; *Tinker v. Kier*, 195 Mo. 183; *Becker v. Fillingham*, 209 Mo. 583; *Jones v. Thomas*, 218 Mo. 508. (3) A court of equity will not grant relief by setting aside a judgment where there is an adequate remedy at law. 1 Black on Judgments (2 Ed.), ch. 15, p. 570, sec. 361. (4) A court of equity will not set aside a judgment regularly obtained in a court of law except for fraud actually committed in the very act of procuring the judgment. *Dorman v. Hall*, 124 Mo. App. 5; *Hamilton v. McLean*, 139 Mo. 638; *State ex rel. v. Shaw*, 163 Mo. 191; *Fitzpatrick v. Stevens*, 114 Mo. App. 497; *Payne v. O'Shea*, 84 Mo. 129; *Irvine v. Leyh*, 102 Mo. 200.

ELLISON, J.—This action is in equity and has for its object the cancellation of a certain judgment against plaintiff rendered by the circuit court of Vernon county in favor of Baxter National Bank and by the latter assigned to defendant. The bill was dismissed in the trial court and plaintiff has appealed.

It appears that defendant sold to plaintiff one twenty-first part of a certain mine in Oklahoma; or, as expressed in the petition, he sold him one-third of one-seventh interest in a mining enterprise, for the sum of two hundred dollars, for which agreement plaintiff gave his check on a bank in Schell City, Missouri. That defendant shortly afterwards sold and indorsed the check to the Baxter National Bank of Kansas, which was an innocent purchaser, in order, as is said, to cut off plaintiff's defense (*Wonderly v. Lafayette Co.*, 150 Mo. 635). But plaintiff charges that defendant practiced a fraud upon him in the sale of the mining property and upon discovering the fraud he notified the bank upon which the check was drawn not to pay it. But that the Baxter National Bank, having purchased the check, brought suit thereon in the Vernon County Circuit Court, and, being an innocent purchaser thereof, obtained the judgment now sought to be cancelled.

The petition alleges that at the time defendant obtained the check he claimed to be forming a company to purchase a lease of mining land in Oklahoma for which he was paying \$4200, divided into seven shares, each share to cost \$600, and that he had all the stock subscribed; and that among the subscribers were Charles Gilbert and Charles Thom, for one share each, for which each had paid \$600. That a company was ready to be formed and that deeds would be delivered for the shares of each. It is then alleged that these representations were false; that Gilbert and Thom had not paid for an interest in the enterprise. It is then alleged that defendant never issued to him any stock, or

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deeded any part of the mining property, and that he had never paid \$4200—such representation as to the price being false; and that nothing was ever done with the enterprise. And that for the purpose of cutting off any defense, defendant transferred the check to the bank.

All the parties concerned appear to have been acquaintances and, except the Baxter Bank, living in Nevada, Missouri. We regard the evidence as unsatisfactory from a legal or equitable standpoint as to the fraud in the representations as to Gilbert and Thom. Plaintiff's actions do not entitle him to any great consideration by the chancellor. While he now puts, as the chief influence leading him to give his check to defendant, the representation that two others were subscribers and had paid up, he seems not to have attached sufficient importance to that representation to have first asked them if they had paid, or to have asked their opinion of the project. Nevada is not a large city and telephones doubtless are on every hand. This seems to justify the belief that what he now characterizes in his pleading as of great importance, was then thought to be a matter of indifference. The record does not show any cause or excuse for this singular omission and we can only attribute it to the fact that it was not regarded by him as of any influential consequence.

Passing by any question whether a false representation that someone else had purchased, who is not alleged to be so related or situated as to affect or control the action or judgment of the party said to have been defrauded, is, in the eye of the law, a fraudulent representation of a material fact, we can well see how the trial court may not have attached great importance to the evidence in the way of proof of controlling influence on plaintiff. Besides, it appeared by the weight of the evidence that Gilbert and Thom had subscribed for the stock. Gilbert admitted he con-

sidered it but did not "remember if I put my name down for a share or not." Thom admitted he had subscribed, but stated he had not paid. The difference lies in the matter of payment. Defendant testified that he did not represent that they had paid, though the weight of the evidence is against him in that regard.

It was shown, without dispute, that there was a mining project to which a number of people subscribed and paid, as did plaintiff, and that defendant himself invested eight hundred dollars. That a lease was in existence for forty acres of mining land conveying one twenty-first interest to plaintiff, three-sevenths to defendant and the remainder to other parties.

In this condition of case as made out by the record, we think the rule requiring deference to the finding of the trial court should receive application. [Tinker v. Kier, 195 Mo. 183, 202.]

In thus disposing of the case we have noted a statement of plaintiff that the trial court did not find for defendant on the ground of failure of proof of fraud. But there is nothing in the record to confirm that statement. From the record the trial court simply determined the case in defendant's favor. There is nothing whatever in the record to indicate the trial court's view of any specific point, save that it refused to declare as a matter of law that plaintiff had failed to make a case. In such circumstances, we must conclude that it was determined on the evidence; and the losing party has no right to say the finding was based on some particular branch of the evidence.

It must be borne in mind that in order to prevail in this action, plaintiff cannot stop at a showing of failure of consideration. He has not chosen to institute an action at law. He has sought a court of equity to cancel a judgment on account of fraud.

The judgment is affirmed. All concur.

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ELIZABETH A. GRANT, Respondent, v. DAVID J. GRANT, Appellant.

Kansas City Court of Appeals, June 2, 1913.

1. **DIVORCE: Maintenance; Indignities.** Though the wife takes the initiative and leaves the husband's home, if she has been impelled to do so by such treatment by him as has rendered her condition intolerable and would entitle her to a divorce, she may maintain an action for support and maintenance.
2. _____: _____: _____: **Trivial Cause: Choice of Home.** Where the causes of trouble between a husband and wife are trivial and where it appears that her leaving the home is largely influenced by a desire to live in town instead of on a farm, no cause of action for separate maintenance exists. Evidence examined and considered.
3. _____: _____: _____: _____: **Evidence.** A letter written by the son of a husband by a former marriage, to the present wife, without the knowledge of the husband, is not proper evidence in favor of the wife's action for maintenance.
4. **ABSTRACT: Counter Abstract: Transcript.** On an appeal by the short form, if the appellant's abstract of the record, in the opinion of the respondent, is not substantially full and complete and fails to properly state the evidence, the latter may file an additional abstract, which, if not controverted by appellant, will be accepted as true. But if objected to by appellant in writing, the court will order the circuit clerk to send up the transcript, from which it will ascertain which is correct. The respondent will not be permitted to omit that course and file in the appellate court the transcript of the trial and refer the court to it to ascertain the evidence. In such case the abstract as presented by the appellant will be accepted as correct.

Appeal from Daviess Circuit Court.—*Hon. Arch B. Davis, Judge.*

REVERSED.

John C. Leopard for appellant.

(1) A wife is not entitled to relief in an action against her husband for maintenance, when she has

left him without his consent or fault, and under circumstances which do not amount to an abandonment by him. Droege v. Droege, 52 Mo. App. 84. (2) A wife is bound to follow the fortunes of the husband and to live where he lives and in the style and manner which he may adopt, and to justify an abandonment of the husband, by the wife, his conduct toward her must have been such as would entitle her to a divorce. Droege v. Droege, 52 Mo. App. 84; Droege v. Droege, 55 Mo. App. 481; Owen v. Owen, 48 Mo. App. 213. (3) Respondent is bound by the statement in her petition that defendant had furnished half of the food that was eaten and all evidence produced by plaintiff to the effect that defendant, during all the time she lived with him, had furnished practically nothing in the way of food, should be disregarded. She is bound by the admission. Pike v. Martindale, 91 Mo. 286.

Dudley & Selby for respondent.

(1) While it is true that in equity cases, the appellate court has jurisdiction to review the facts as well as the law, the usual practice is to defer largely to the finding of the chancellor when the evidence is very conflicting. The reason for this deference rule is because of the superior advantages possessed by the chancellor for weighing the evidence and judging the credibility of the witnesses, and this is more especially true when, as in this case, the witnesses here testified orally. Wyrick v. Wyrick, 162 Mo. App. 732; Foster v. Williams, 144 Mo. App. 227; Danforth v. Foster, 158 Mo. App. 94; Rood v. Mining Co., 157 Mo. App. 410; Mining Co. v. Coyne, 164 Mo. App. 507. (2) Where defendant's conduct is such as to render plaintiff's condition intolerable, or unbearable, she can leave him and maintain her suit for separate maintenance. McGrady v. McGrady, 48 Mo. App. 668; Kurz v. Kurz, 119 Mo. App. 53; Palster v. Palster, 145 Mo.

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App. 606; Lindenschmidt v. Lindenschmidt, 29 Mo. App. 295. (3) There is nothing in the statute that requires that there shall be the same particularity of allegation in actions of this character, as in actions for divorce and a defendant would certainly know that where a wife seeks to justify her leaving him, all his conduct toward her and his treatment of her would be brought in issue and where she says in her petition —among other charges therein—“and in addition to being thus deprived, she was constantly upbraided and quarreled at and found fault with by the defendant, etc.,” it ought to be broad enough to cover her charge that he constantly threw up to her his taunt that she had signed his name to the note at the Farmers Exchange Bank, without his authority. Sec. 8295, R. S. 1909; Munchow v. Munchow, 96 Mo. 553.

ELLISON, J.—Plaintiff is the wife of defendant and brought this action against him for maintenance. She obtained an allowance in the trial court for ten dollars per month, and defendant appealed.

Plaintiff alleges that she left defendant's home for the reason that he mistreated and failed to support her. They were married in 1898 and lived together until she left him in 1909. Each had been married before and each had grown children by their former marriages. These children had married and at the time of separation were living to themselves. Each had property when married, though in an unfortunate move to Texas each lost most of it, though defendant kept his farm (a fairly good one) of about one hundred acres, in Daviess county. Plaintiff remained in Texas for a considerable time after defendant returned to this State. On her return they lived together on the farm, and with the exception of complaints on plaintiff's part of the disrepair and discomforts of the house and of slowness on defendant's part to give her proper money for personal expenses, seemed to

prosper. She owned and kept cows and chickens, rather as her separate property. Plaintiff testified that defendant did not contribute as he should towards clothing for her, though she seldom asked him, and that he complained and "fussed" about the feed for her chickens and pasture for her cows. Plaintiff no doubt was industrious. After she returned from Texas she raised turkeys, chickens, pigs and calves, as well as berries and vegetables, and netted about five hundred dollars, which she had at interest. She bought a buggy and used his horse for visits and her comfort. She made a visit to Salt Lake City, and several visits to her married daughter in Nebraska, though she paid for these from her earnings.

There was testimony by plaintiff and by some persons who had visited them, that the house was uncomfortable in the winter. She said the roof leaked, but that defendant had a new one put on. In the course of her testimony she stated that they were buying some stock—that she put in twenty-five dollars and defendant told her "to go to the bank and get the money and tell the banker to sign his name and the banker told me to sign his name and I did so and got the money." This note was for \$185. Defendant himself got \$150, signing his own name, making \$335. She then stated that afterwards defendant accused her of forging his name and "said he had not given her authority to sign it."

Finally "he swore he wouldn't furnish feed for my chickens any longer . . . and I said if I can't even have feed for my chickens there is not much in it for me, and if I have to sell them I will get out while I have the money to get out with. . . . I sold my stock and a greater part of my household goods, took some with me. I could not live with him now, even if he would support and care for me as I think he should, because I value my soul; I value my hereafter. I don't think anybody could live with any of them and

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live a Christian life. I did think I could forgive and still live with him, if he promised to support me, until he accused me of things I never did" (signing his name to the note).

She further testified that after leaving defendant she "went to her daughter's home in Nebraska and stayed two years, then came back, went to Jameson and Gallatin and visited old friends and then went to my daughter's at New Hampton, where I have been most of the time since." She further testified that she had a talk with defendant since this action was begun, saying: "He told me one of the neighbors was poisoning their chickens. I told him I wouldn't go out there on the farm and live in all the fuss, for all they had, if it was just deeded to me. He said he would buy a house in Jameson for us to live in; he told me where, and I said I would rather live on the other side of town where there were walks, so I could go to church. I told him he must furnish the house, that I had sold off all my household goods. I said you never did clothe or give me any money, I would have to have spending money to clothe myself. He said he always gave me one-half of everything he had and I told him some one else would have to settle it." And in this connection we may say that a witness for defendant testified that plaintiff told him while at his house at about the time this action was brought, that she would live with defendant if he would buy property in town and move in where they could live easier.

Defendant for himself testified in denial of any mistreatment of plaintiff. Said he considered the house comfortable. That he gave her money many times. That she had all the money from sale of produce and chickens, besides the money from her own cows, calves and hogs, and that she had much more money than he had. He told her of the provisions of his will for her, and for the purpose of showing his

considerate feeling for her the will was introduced, showing liberal provision in her behalf, considering his means.

A letter to plaintiff, said to be from one of defendant's sons, married and living to himself, was introduced in evidence over defendant's objection. There was no showing that defendant knew of the letter, or that he approved of its contents and it ought not to have been considered. But regardless of that error, we think the judgment should have been for defendant on the whole case. The fact, standing alone, that plaintiff left defendant's abode, will not deprive her of her statutory action for maintenance. If the husband's treatment of the wife is such as to make her condition intolerable; if it is such as would afford her ground for an action for divorce, she may quit their residence and bring her action for maintenance. [McGrady v. McGrady, 48 Mo. App. 668; Droege v. Droege, 52 Mo. App. 84; Polster v. Polster, 145 Mo. App. 606; Wyrick v. Wyrick, 162 Mo. App. 723, 735.]

But we think the plaintiff's situation was not such as to afford her just ground for leaving the home and demanding separate support. The trouble between them was largely trivial. We do not find defendant to be responsible for much of her discontent. Their loss of property was no more chargeable to him than to her. It was a misfortune without blame for either. His feeling for her, as is evidenced by the will, was not unkind, and we are not persuaded that she suffered for the plain comforts of life, which is all she could ask in their situation. It appears from her own testimony that she would have been willing to resume her abode with him if he would move to town—that is, to a particular part of town. More than that, it seems that defendant's failure to give her money for clothing was not the reason of her refusal to continue to live with him. The immediate cause, as she states it, was his refusal further to feed her chickens. And her refusal

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to forgive and still live with him was because of his accusing her "of things I never did," referring to the accusation of forging his name to the note for \$185. It does not appear, certainly, that defendant used the word "forgery." It was true that plaintiff had signed his name to the note, as shown above, at the request of the banker and without authority from defendant. She no doubt did it innocently enough, and it is probable whatever defendant said about it was to remind her that he had not authorized her to do it.

But plaintiff claims that defendant's abstract of the evidence upon which we have depended is not full and, as the case has been appealed by the short method, she has had the full transcript sent to us and we are asked to read it for a better understanding of the facts. We cannot do that. It is not contemplated by the statute or rule 15 of this court that we should. The statute (Sec. 2048, R. S. 1909) provides that if a respondent is dissatisfied with the abstract presented by an appellant, he shall file an additional abstract on his part, and if the appellant shall not concur in it, he shall specify in writing his objections. An issue is thus made and the court will make an order requiring the circuit clerk to send a certified transcript. Instead of pursuing this course, plaintiff filed a "suggestion of diminution of the record," and obtained an order for a full transcript to be sent to this court. The suggestion alleges that defendant's abstract "fails to include all the testimony of the witnesses, and also fails to include all the documentary evidence in the case; that it assumes to include the substance of the oral testimony, but such abstract is only partial and not sufficient for a full and fair consideration of the case on its merits."

An appellant's dereliction may be of such character as upon proper motion and showing in support thereof, the court will dismiss his appeal. Or, it may appear to be of the nature now insisted upon by plain-

tiff, in which case the respondent should file an abstract of the parts omitted by the appellant, which, if not controverted by the latter, as pointed out in the statute, will be accepted by the court. In no instance is it proper to evade the statute and rules by referring the court to the transcript *en masse*.

Concluding the finding should have been for defendant, the judgment is reversed. All concur.

DWIGHT M. SMITH, Defendant in Error, v. ORION F. RUSSELL, Plaintiff in Error.

Kansas City Court of Appeals, June 2, 1913.

1. **PRACTICE, APPELLATE: Abstract: Record Proper.** An abstract of the record proper should show the case was tried, a judgment was rendered, and for what it was and for whom it was.
2. **—: Motion for New Trial: Term: Four Days: Court: Statute.** The abstract of the record proper failed to show the filing of a motion for new trial at the term of trial, or within four days. This was a fatal defect. It did show that the motion was filed "in the time allowed by the court," but the statute fixes the time and such statement does not show a proper filing.
3. **—: —: —: Record: Bill of Exceptions.** Showing matters belonging to the record proper, in the bill of exceptions will not cure the defect in the abstract. A bill of exceptions is allowed for showing matters of exception; and inserting things therein not belonging there, but which belong to the record proper, will not cure the failure to enter them in the latter place.
4. **—: —: Rule: Bill of Exceptions: Filing.** Notwithstanding the rule making unnecessary an abstract of record entries evidencing leave to file, or filing of, a bill of exceptions, it is yet necessary that the abstract of record proper should state that the bill was filed.

Smith v. Russell.

Error to Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

AFFIRMED.

J. W. Farrar, T. J. Wise and *H. W. Hord* for plaintiff in error.

(1) All oral representations and memorandum are merged into the subsequent writing. *Wheeler v. Ball*, 26 Mo. App. 450; *Johns v. Wood*, 16 Pa. St. 25; *Rawls on Covenants* (4 Ed.), 566; *Fritz v. McGill*, 31 Minn. 536; *Cronnister v. Cronnister*, 1 Watson S. 442; *Phillips v. Church*, 23 S. C. 297. (2) Frauds must be alleged and proven. *Holland v. Anderson*, 38 Mo. 59; *Bigelow on Fraud*, p. 56; *Bailey v. Smock*, 61 Mo. 218. (3) Plaintiff's evidence failed to prove the existence of any fraud upon the part of plaintiff in error, and wholly failed to prove the *scienter*. *Reamers v. Reamers*, 217 Mo. 541; *Bank v. Hutton*, 224 Mo. 42; *Adams v. Barber*, 157 Mo. App. 370; *Decker v. Dimer*, 229 Mo. 296; *Troll v. Spencer*, 141 S. W. 855; *Alvin v. Hartman*, 146 Mo. App. 155. (4) All transactions are presumed to have been made in good faith and a party is not bound to disprove the existence of fraud. *Thomas v. Scott*, 221 Mo. 271, 214 Mo. 430; *Decker v. Dimer*, 229 Mo. 296.

Ross B. Gilluly for defendant in error.

(1) Fraudulent representations do not merge into subsequent written contract. *Leicher v. Keeney*, 98 Mo. App. (K. C. Ct. App.) 394; *Gooch v. Connor*, 8 Mo. 391; 14 Am. & Eng. Ency. Law, pp. 168-9. (2) Under facts in evidence, and law applicable, plaintiff below was entitled to recover. *Smith on Law of Fraud*, secs. 45-76; *Bank v. Crandall*, 87 Mo. 208; *Manter v. Truesdale*, 57 Mo. App. 435; *Morley v. Harrah*, 167 Mo. 74; 20 Ency. Law and Procedure, pp. 14-15; Cot-

trill v. Crum, 100 Mo. 397; Brownlee v. Hewett, 1 Mo. App. 360.

ELLISON, J.—Plaintiff's action was begun before a justice of the peace. On appeal to the circuit court judgment was rendered for plaintiff and defendant has brought the case here.

The abstract of the record proper shows a written statement of the cause of action, a written answer thereto and a reply. But there is no showing made of when the case was tried, or when judgment was rendered, or what the judgment was, or for whom it was. After setting out the pleadings in full, the abstract recites the following, only: "That thereafter the court, sitting as a jury, tried the cause and rendered judgment, which said judgment is embodied in the bill of exceptions herein incorporated, to which reference is hereby made." There is no proper showing that a motion for new trial was filed during the term or within four days. All that it said on that head is as follows: "Motion for new trial was thereafter, and in the time allowed by the court, duly filed, and were by the court overruled; all of which orders are incorporated in the bill of exceptions and in the transcript herein filed, to which reference is hereby made."

The statute fixes the time for filing motions for new trial, and not the court. A reference to the bill of exceptions, which latter shows that the motion was filed at the term and within four days, will not cure the omission. The proper showing must be in the record proper. A bill of exceptions is allowed for showing matters of exception, and inserting things therein not belonging there and which are of the record proper, will not cure the neglect to enter them in the latter place. [Langstaff v. Webster Groves, 246 Mo. 223; Wallace v. Libby, 231 Mo. 341; Milling Co. v. St. Louis, 222 Mo. 306; Harding v. Bedoll, 202 Mo. 625.]

There is a total failure to show in the record

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proper that a bill of exceptions was filed. This also is a fatal defect. For notwithstanding our rule (26) (taken from rule 32 of the Supreme Court, adopted December 12, 1912) making unnecessary an "abstract of record entries evidencing leave to file, or filing of, a bill of exceptions," it is yet necessary that the abstract of the record proper should state that the bill was filed.

We regard the written statement or pleadings as ample to support the judgment, and it is accordingly affirmed. All concur.

GARRARD CHESTNUT, Respondent, v. KANSAS CITY, Appellant.

Kansas City Court of Appeals, June 2, 1913.

1. **MUNICIPAL CORPORATIONS: Street Commissioner: Discharge: Civil Service.** The charter of Kansas City does not give a fixed and definite term to the position of district superintendent of streets, and, subject to the provisions of the charter in relation to civil service, he may be discharged by the street commissioner at any time.
2. _____: _____: **District Superintendent: Salary: Service.** A district superintendent of streets was verbally appointed by the street commissioner of Kansas City for and during a certain mayoralty administration, his salary being at the rate of \$1000 a year. He was suspended for want of funds, for a period of six weeks, during which time the city refused to pay him. It was held that he had no cause of action against the city.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas, Judge.*

REVERSED.

A. F. Evans, J. W. Garner and A. F. Smith for appellant.

(1) In the absence of any limitation fixed by statute, an appointing officer may remove his appointees

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at pleasure. Throop, Public Officers, secs. 354, 361; 2 McQuillin, Mun. Corp., sec. 558; State ex rel. Kane v. Johnson, 123 Mo. 43, 50. Plaintiff's appointing officer having the power to finally remove plaintiff at pleasure, he had the power to temporarily remove him, especially when there were not sufficient funds to keep him in service. (2) Even when the law forbids the removal of officers or employees except for cause and after a trial, that law does not apply when the removal is made for economical reasons. State ex rel. v. Edwards, 40 Mont. 287, 106 Pac., 695, 699; Donaghy v. Macey, 176 Mass. 178, 45 N. E. 87; Leftbridge v. Mayor, 133 N. Y. 236, 30 N. E. 975; Fitzsimmons v. O'Neill, 214 Ill. 494, 73 N. E. 797; Kansas City Charter, sec. 10, art. 15.

R. J. Holmden for respondent.

ELLISON, J.—This is an action for balance claimed to be due plaintiff as his compensation for service in the capacity of district superintendent of streets in Kansas City, Missouri. He recovered judgment in the trial court and the city appealed.

The charter of Kansas City (Secs. 12 and 13, Art. 10, Charter 1909) provides that the board of public works shall appoint a "commissioner of street cleaning" for Kansas City, who shall have general control, charge and direction of street cleaning. He has authority to appoint, among other positions, such number of "district superintendents," as well as "foremen, employees and laborers, as may be provided by ordinance."

The charter (Sec. 27, Art. 4, Charter 1909) also provides that the board of public works with the concurrence of the common council shall "fix a general schedule of the number, grade and compensation of all agents and employees in the department under its

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control." In accordance with this authority the board of public works did fix a schedule for the street department, consisting among others of a street commissioner and five district superintendents, the former at a compensation of three thousand dollars per year and the latter at a compensation of one thousand dollars per year.

In the years 1908 and 1909, Thomas Pendergast was street commissioner and he appointed this plaintiff one of the district superintendents as above authorized—the employment beginning in May, 1909, and finally ceasing in May, 1910, a new administration having been elected. For two weeks in each of the months of November and December, 1909, and February, 1910, the commissioner suspended plaintiff, or, as expressed by plaintiff himself, "laid him off," for want of sufficient funds for the use of the department.

Plaintiff's appointment seems to have been verbal, and it was conceded at the trial that there was no record of it; the only record connected with the matter being entries of semi-monthly payments to him for services performed. No oath, bond, or written appointment appear in the case.

The case seems to turn on the power of Pendergast to discharge plaintiff. Authority cannot be found in either the charter or the ordinances fixing a term to the employment of a street district superintendent. It is our opinion that the charter does not contemplate a fixed and definite term of office for a district street superintendent, and that he may be discharged from such employment at the discretion of the commissioner, just as an ordinary employee. [2 *McQuillin Mun. Corp.*, sec. 558; *Throop Public Officers*, secs. 354, 361; *State ex rel. v. Johnson*, 123 Mo. 43; *Robertson, v. Coughlin*, 196 Mass. 539.] In the schedule of places which the board of public works is required to make out, with the compensation attached, we find in the resolution of the board, approved by the council, a long

list of employees and agents, with compensation in figures carried out opposite each, and these figures are under a heading, at the beginning, of "salary per year," district superintendents having \$1000 opposite that place. But this only signifies that he is to be paid at that rate and so he was given semi-monthly warrants. It does not have the effect of making for him a definite term.

We find in plaintiff's brief some suggestions which we think are not borne out by the evidence. The evidence shows that plaintiff was discharged at the three several times for the reason that there was "no work" and that "they were short of funds." There is no evidence, properly considered, that justifies the idea that plaintiff had a right to remain in the service of the city during the period of these discharges. The meaning of the evidence is that when he was wanted, or if he was wanted again, he would be called, or notified. Again, we think plaintiff's testimony shows he did not consider he had a fixed term. His attorney asked him this question: "Were you appointed for any length of time?" And he answered in these words: "Just during the Crittenden administration, one year." At the time of his employment, the Crittenden administration would terminate more than a month short of a year.

The present charter of Kansas City contains an article on civil service (Art. 15, Charter 1909) whereby most of the positions under the city government, including that plaintiff occupied, are placed in what is designated as the "competitive class." By the terms of section 10 of that article, the heads of the several departments have the power of removal, but there are protective restrictions and rights which may be asserted by the subordinate if he chooses. It is said that civil service commissioners had not taken necessary action for the enforcement of the civil service provisions at the time of the origin of this controversy.

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However that may be, the case was not tried under the provisions of that law, and we therefore have no occasion to interpret it.

In our view plaintiff has no cause of action against the city and the judgment will therefore be reversed. All concur.

WM. ADCOX, Respondent, v. WESTERN UNION
TELEGRAPH CO., Appellant.

Kansas City Court of Appeals, June 2, 1913.

1. **TELEGRAPH AND TELEPHONES: Penalty for Failure to Transmit: Message to Point Outside of State.** Where the contract to send the message was made in this State, and the failure to transmit promptly also occurred in this State, the fact that the message was addressed to a point outside the State will not render the statute, Sec. 3330, R. S. Mo. 1909, inapplicable, because, under such circumstances, its enforcement does not involve giving the statute extraterritorial force, nor is it a regulation of or limitation on interstate commerce.
2. **_____: Application of Statute.** The statute, section 3330, is a penal one and must be strictly construed. By its terms it applies only "upon payment or tender of the usual charges" and where the message was, at the request of the sender, sent "collect," there can be no recovery of the penalty. Before the penalty can be exacted there must be either an actual payment or an actual tender of the charges.
3. **_____: Tender of Charges.** A tender is an unconditional offer to pay. An announced willingness to pay on condition that the telegram cannot be accepted upon any other terms is not sufficient. The facts in this case reviewed and held to show no tender was made. There was no refusal on the agent's part to accept the money, merely a consent to send the telegram on the terms requested by the sender. If the latter wanted the company to send the telegram at its peril with reference to the penalty, he should have paid the charges or actually tendered them.
4. **_____: Delay in Transmitting Message: Damages.** Delay under such circumstances would render the company liable to damages but not to the penalty.

Appeal from Livingston Circuit Court.—*Hon. Arch B. Davis, Judge.*

REVERSED.

Fred S. Hudson for appellant.

(1) This being a penalty statute, it must be strictly construed and plaintiff must bring himself clearly within its provisions without guessing or without inference or intendment before he can recover. Cowan v. Telegraph Co., 149 Mo. App. 407; Edrington v. Telegraph Co., 115 Mo. App. 98; Rixke v. Telegraph Co.; 96 Mo. App. 410; Grant v. Telegraph Co., 154 Mo. App. 279; Wagner v. Telegraph Co., 152 Mo. App. 369; Moore v. Telegraph Co., 164 Mo. App. 165.

(2) Plaintiff's objection to the introduction of any testimony in this case should have been sustained because the petition shows on its face that it was an interstate message and petition further states that the tolls were not paid. Langley v. Telegraph Co., 15 S. E. 291; Western Union v. Ryals, 21 S. E. 573; Western Union v. Mossler, 95 Ind. 29; Wagner v. Telegraph Co., 152 Mo. App. 373. (3) Companies engaged in transmitting messages from one state to another are engaged in Inter-state Commerce and are under the control of the Act of Congress approved June 18, 1910. 24 Stat. L. 379; Railroad v. Reid, 222 U. S. 424, 56 L. Ed. 257.

Frank W. Ashby for respondent.

(1) It was negligence on the part of appellant's agent to hold the message in question three hours and forty-seven minutes, at its office in the city of Chillicothe, knowing that it was a rush message. Parker v. W. U. Tel., 87 Mo. App. 553. (2) Respondent agrees that the statute imposing a penalty without

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evidence of damage is penal, and should be strictly construed, yet, this does not mean that the court is to interpret the statute so as to exclude cases coming reasonably within its scope. *Moore v. Telegraph Co.*, 164 Mo. App. 165; *Parker v. W. U. Tel.*, 87 Mo. App. 553. (3) And the burden of proof is upon the company to show that the wires were engaged as the reason for the delay in transmitting of dispatch. Sec. 3330, R. S. 1909. (4) And when plaintiff took the money out of his pocket and told defendant's agent that he was ready to pay for the dispatch, and the agent did not accept the offer, plaintiff was not required to count out the exact change. *Stevenson v. Kilpatrick*, 166 Mo. 263; *Potter v. Schaffer*, 209 Mo. 593.

TRIMBLE, J.—Plaintiff sues to recover of defendant the penalty imposed by section 3330, Revised Statutes of Missouri 1909, for failure to promptly transmit a telegram from its office in Chillicothe, Missouri, to the city of Indianapolis, Indiana.

A jury was waived and the case was tried by the court. There is no dispute over the fact that there was a failure to transmit promptly. The delay in sending said message occurred in the office at Chillicothe. This also is undisputed.

Plaintiff delivered the message to defendant's agent in the telegraph office at a little before eight o'clock in the morning, and explained to the agent that it was important to get it off at once so it would be certain to reach the addressee before noon else it would be of no avail to send it. The agent promised he would send the message at eight o'clock, that being the hour at which the work of the office properly began in the morning. The agent did not do so, however, for the reason that, after plaintiff left the office, a telegram came to plaintiff which the agent supposed related to the same transaction, and which the agent

thought would obviate the necessity of sending the message plaintiff had delivered for sending. The two messages had nothing to do with each other, however, and the delay was caused by the agent taking upon himself the responsibility of holding plaintiff's message until a few minutes after twelve, and after the time had expired for it to be of any avail. The agent had no ground whatever for holding the message, as he had been told to send it at once and had promised to do so, and the message sent by plaintiff was addressed to a corporation, while the one received was from an individual.

Defendant's main contention is that, as the message was addressed to a point outside the State of Missouri and was therefore, an interstate message, and the defendant was engaged in interstate commerce; and, as the statute cannot regulate such commerce not having an extraterritorial force, the defendant is not liable to the penalty prescribed.

It is true the statute does not have any extraterritorial force, nor can it apply if its enforcement is, in any degree, a regulation of interstate commerce. It is also true that, in a number of cases, it has been remarked that the statute in question can have no application except in those cases where there is "a failure to promptly transmit from a place in this State to the addressee at another place also in this State." But an examination of those cases will disclose that such remarks were a little broader than the facts therein warranted. In all of them the contract calling for the exercise of defendant's common law duty, and the negligence or violation of that duty, or at least a constituent element of that violation, occurred outside of the State. Hence, as the statute could have no extraterritorial force, it could not be made applicable or be enforced in such instances. In the case of *Rixke v. Western Union*, 96 Mo. App. 406, the violation of duty charged was a failure to *deliver* the telegram in Leav-

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enworth, Kansas. The statute, as it stood at that time, was held not to include failure to deliver, but the court held that, even if it did, there could be no recovery, since the negligent act occurred outside the State. And it was in speaking of this that language was used to the effect that the statute applied only in cases where the message was between points within the State, and not to a point outside.

In Wagner v. Western Union, 152 Mo. App. 369, the telegram was sent from a point in the State of Kansas to a point in Missouri. In other words, the contract out of which defendant's common law duty arose, and on which the claim for penalty in that case was based, was executed outside of the State. And, as the statute is penalty, it must be strictly construed, and, having no extraterritorial force, it could not apply. In Connell v. Western Union, 108 Mo. 459, the violation of duty charged was the failure to *deliver* the telegram at Leavenworth in the State of Kansas. The Supreme Court, on page 463, says the duty charged to have been violated by defendant was "not that it failed to *receive and transmit* the message" at Sedalia, but that it failed to deliver it at Leavenworth in Kansas; and that the duty imposed by the statute upon defendant was to *receive and transmit* the message *at Sedalia*. It would seem from this that, had the delay or violation of duty been shown to have occurred at Sedalia, a point within the State, and where the contract to receive and transmit was made, the Supreme Court would not have held the statute inapplicable.

So that, so far as we have been able to discover, there is no case holding that, where the contract and the delay both arose in the State of the statute wherein the penalty was sought to be enforced, the statute is not applicable because the telegram happened to be addressed to a point outside the State. On the contrary, this court, in an opinion by Johnson, J., in the

case of *Hewitt v. Western Union*,—Mo. App.—, decided May 19, 1913, and not yet reported, held that where the contract was made in this State, and the violation of the duty to promptly send, also occurred in this State, the statute applied. Under such circumstances there is no extraterritorial operation of the statute, nor is there any limitation or regulation placed on interstate commerce by the application and enforcement of the statute. [*Telegraph Co. v. James*, 162 U. S. 650; *Telegraph Co. v. Crovo*, 220 U. S. 364.] The case last cited grew out of a suit bought by Crovo in Virginia to recover a penalty under a statute of that State for failure to promptly transmit a telegram from its office in Richmond, in that State, to Brooklyn, New York. The point was made that the statute did not apply, but the trial court held that, as the jury found the delay occurred in Virginia and not in New York, the penalty was recoverable; and the Supreme Court of Appeals of Virginia, in denying a writ of error, said that "the judgment was plainly right." A writ of error was sued out in the United States Supreme Court (being the case last cited as above stated); and in that case it was held that the statute was "neither a regulation of nor a hindrance to interstate commerce, but is in aid of that commerce."

Objection is made to the action of the court in allowing plaintiff to amend his petition so as to expressly state that the charges for the telegram were tendered at the time the message was delivered for transmission. This, however, was permissible under our statute. [Sec. 1848, R. S. Mo. 1909; *Lowenstein v. Railway*, 134 Mo. App. 24, l. c. 34.] The fact that this was an action to recover on a statute penal in its nature does not change the law in relation to pleadings in the case.

But the defendant contends that the charges were neither paid nor tendered, and, therefore, there can be no recovery. It must be borne in mind that the

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statute on which the case is bottomed is penal and must be strictly construed. Plaintiff, in order to recover, must bring himself clearly within its terms and provisions, and show that his case comes clearly within its manifest spirit and intent. [Cowan v. Telegraph Co., 149 Mo. App. 407; Edrington v. Telegraph Co., 115 Mo. App. 98; Grant v. Western Union, 154 Mo. App. 279.] Now our statutes says: "It shall be the duty of every telegraph . . . company . . . in this State . . . on payment or tender of their usual charges . . . to transmit and deliver . . . said dispatch . . . promptly under a penalty of three hundred dollars for every neglect or refusal so to transmit and deliver, etc." By the express provisions of the statute, the liability to the penalty is made to rest on the failure to promptly transmit *on payment or tender of the usual* charges. In Western Union v. Ryals, 21 S. E. 573, it is held that an actual payment or tender of the charges is a prerequisite to a recovery of the penalty provided by the statute; that neither the agreement between the sender and the agent that the charges shall be held as a debt to be subsequently paid by the sender, nor an agreement that they shall be paid by him and a third person jointly, can take the place of payment or actual tender with reference to the penal element of the statute, and that the fact that the message was sent marked "prepaid" made no difference. The court, on page 574 says: "If he (the sender) wishes the company to transact his business at its peril with reference to the penalty, he must either pay in cash or make the tender required by the statute." [See also Langley v. Western Union, 15 S. E. 291; Western Union v. Mossler, 95 Ind. 29.]

That the charges were not paid is conceded. The original petition alleged that "the said agent agreed to collect the usual and regular charges for transmitting said dispatch from the addressee therein." After

the plaintiff had closed his testimony, and while the defendant was offering its evidence, plaintiff, by leave, amended by interlining, just in front of the above quoted allegation, the words "he (plaintiff) tendered to the agent and operator of defendant in charge of its office aforesaid its usual charges for transmitting said dispatch as established by the rules of defendant, and he refused to receive the same." As the non-payment of the charges is conceded, does the proof show that the charges were tendered?

A tender is defined by Black's Law Dictionary to be: "An offer of money; the act by which one produces and offers to a person holding a claim or demand against him the amount of money which he considers and admits to be due, in satisfaction of such claim or demand, *without any stipulation or condition.*" To constitute a tender there must be an *unconditional offer to pay*. [Henderson v. Cass County, 107 Mo. 50; Ruppel v. Mo. Building Assn., 158 Mo. 613 l. c. 622.] A tender to be good must be unaccompanied by any condition to which the creditor has a right to object. [28 Am. & Eng. Ency. of Law (2 Ed.), p. 31.] And before a tender can be said to be waived, the tenderee must have refused to accept it or must have placed himself in such position as would make a tender an unnecessary act. [38 Cyc. 136.] A mere assertion of readiness or willingness to pay is not sufficient. [38 Cyc. 142.]

An examination of all the testimony discloses that there was no real tender of the money in this case, nor was there either an express or implied refusal on the part of the agent to take it. On the contrary, it shows that, at *plaintiff's request*, the message was accepted to be sent "collect" that is, without payment of charges by the sender but which were to be obtained by the company from the addressee, and, in case of failure to collect from the addressee, then the sender was to pay. In other words, the message was

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not a prepaid but a credit transaction. Plaintiff testified on this point as follows:

"Q. Go ahead and tell what you said there about the payment of the message, what the agreement was.
A. I was quite anxious to get it off but had been in the habit, which is generally customary with all company's messages and expenses such as that which they always make up in their sworn statement, and I asked him to count it up and he told me what it come to and he said, 'Do you want to send it "collect" or pay it here?' I said, 'I would rather you would send it "collect,"' but I can pay you here if you want it;' and he said, 'All right, I will send it "collect,"' and I said, 'If you fail to collect, I will pay it anyway,' and I took the money out of my pocket and said, 'I can pay it here if you want me to.'"

A little further on in again describing what took place between him and the agent plaintiff said: "He first counted it up and he said how much it is and he said eighty cents, as well as I remember. He said, 'Do you want it sent "collect" or pay it now?' I said, 'I have been sending them that way according to instructions, but if you can't send it that way, I will pay you now,' and pulled out the money.

"Q. If he couldn't send it how? A. Collect.

"Q. Did he say it would go 'collect'? A. Yes."

The agent testified that:

"A. Mr. Adcox came in and wrote out the telegram going to the Prudential Casualty Company at Indianapolis, Indiana, and I asked him whether to send it paid or collect, and he says 'send it collect.' He asked me when I would get it off and I told him at eight o'clock, as soon as I would open up.

"Q. He got in there a little before eight? A. Yes, sir.

"Q. You told him you would send it when you opened up? A. Yes, sir.

"Q. Did Adcox pay for it? A. No, sir.

"Q. Did he offer to pay for it? A. No, sir."

He further testified that no money was offered him at all; that he saw no money in plaintiff's hand; and that he sent the message, as requested, "collect" that is, the charges to be paid for by the addressee. This was all the testimony bearing on the question of tender. In our opinion it does not show any tender whatever, but does show that the message was sent on a credit basis and sent thus at plaintiff's request. Of course in passing on this point we must accept everything said by the plaintiff as literally true and what he says is to be most liberally construed in his favor. But, after doing this, the most that can be said is that he handed the message to the agent and requested him to send it "collect" and the agent, without demurring or objecting in any way, acceded to his request and sent it on those terms. The fact that plaintiff may have pulled a dollar out of his pocket and said "I will pay you if you can't send it that way" does not change the situation. He still wanted the message sent on a credit basis and it was sent that way. As said by the court in *Western Union v. Ryals*, supra, if he "wanted the company to transact his business at its peril with reference to the penalty, he must either pay in cash or make the tender required by the statute." Payment in cash was not waived, nor did the agent refuse to accept the case. He merely granted plaintiff's request to send the message on a credit basis and agreed to look to the addressee for payment afterwards, or in case of its refusal to pay, then to plaintiff for it. The transaction was nothing more than a sending of the message on credit, that is, on a basis to which the penalty statute does not apply. The fact that plaintiff took a dollar from his pocket and said "I will pay you if you can't send it that way" did not change its nature or make such announcement a tender. One

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could go into a store and shake a roll of bills as big as one's arm under the proprietor's nose and say: "I want to get this suit of clothes on credit but, if I can't get it that way, I am willing to pay you," and yet this would constitute no tender of the money if the store-keeper granted his request and told him to take the goods along, and the purchaser was charged therewith.

Of course we do not say that defendant would not be liable for *damages* for failure to transmit promptly under such circumstances, but that is not this case. This is a suit for a statutory *penalty*, and the plaintiff must bring himself squarely within the terms of the statute. The cases cited by respondent as holding the company liable even if there was no tender but merely an agreement to collect the charges later, are not cases under the statute to recover a penalty, but suits to recover damages for negligence. [Cogdell v. Western Union, 135 N. C. 341, 47 S. E. 490; Western Union v. Cunningham, 99 Ala. 314, 14 So. 579; Western Union v. Henley, 157 Ind. 90.] The cases of Western Union v. Yopst, 20 N. E. 222, was to recover a penalty. But, in that case, the agent declined to receive compensation and requested that he be allowed to collect the expense from the addressee. And the court held that, as failure to pay for the message at the time of sending it, was the result of the agent's act, the company could not escape liability on the ground that compensation was not paid at the time the message was delivered to the agent by the sender. That is an entirely different situation from the one presented here. The request to send the message "collect" came from the sender in the case before us, and there was no refusal on the part of the agent to accept the money. He merely acceded to plaintiff's request and accepted the telegram on the same terms plaintiff had been accustomed for more than a year to send them, namely, on a credit basis, that if the addressee refused to pay,

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he would do so. Under such circumstances we do not think the statute applies, and, it being penal, we cannot stretch it to make it fit the case. The judgment is, therefore, reversed. All concur.

DAVID REIDY, Appellant, v. AMELIA E. REIDY,
Respondent.

Kansas City Court of Appeals, June 2, 1913.

1. **PRACTICE, APPELLATE: Abstract of Record: Bill of Exceptions: Allowance of Appeal.** Under Rule 26 of this court, adopted January 6, 1913, the abstract of record need not set out the record entries showing leave to file, or the filing of the bill of exceptions, or the various steps taken to perfect the appeal. Statements in the abstract of record that the bill of exceptions was duly filed and the appeal was duly taken will be sufficient in the absence of a record showing to the contrary.
2. **_____: Rule 15: Default: Evidence.** The proper and efficient dispatch of business in the appellate court requires a reasonable compliance with Rule 15, and the court cannot allow violations thereof or encroachments thereon without inflicting the penalty provided for such violations. Affidavits filed to show excuse for failure to comply with such rule must affirmatively exclude every theory of the litigant's carelessness or blame for such failure. If all the affidavits say can be accepted as true and yet leave room for the negligence of the litigant to cause the failure, such affidavits are insufficient.

Appeal from Moniteau Circuit Court.—*Hon. John M. Williams*, Judge.

MOTION TO DISMISS APPEAL SUSTAINED.

Frank H. Farris, R. L. Kay and L. F. Wood for appellant.

If one of the parties to the marriage contract absents himself or herself without a reasonable cause for the space of one year, it is legal and just grounds for divorce. R. S. 1909, sec. 2370. It is the duty of the

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wife to live with her husband and abide his fortunes in sickness and health, in poverty and riches and make his will her will where it is not in conflict with the law of God. *Messenger v. Messenger*, 56 Mo. 335; *Kaster v. Kaster*, 45 Mo. App. 118; *Wilson v. Craig*, 175 Mo. 405. And an offer to return and abide with her husband, to defeat the charge of desertion, must be made in good faith and not for the purpose of laying a foundation to defeat an action for divorce. *Messenger v. Messenger*, 56 Mo. 335. The right to a divorce does not rest in the discretion of the court, but is a statutory one, which the court is bound to enforce. *Morgan v. Morgan*, 134 Mo. App. 164. It is the duty of the appellate court to review the evidence and enter such judgment as the trial court should have done. *Ashburn v. Ashburn*, 101 Mo. App. 369.

R. M. Embry for respondent.

The plaintiff wholly failed to make out a case of desertion. The three things that must concur, in order to establish desertion, were not proven by plaintiff, appellant, nor was any one of them proven by plaintiff. *Davis v. Davis*, 60 Mo. App. 545; *Gilmer v. Gilmer*, 37 Mo. App. 672; *Scott v. Scott*, 44 Mo. App. 600; *Neff v. Neff*, 20 Mo. App. 182.

TRIMBLE, J.—In this case a husband sues his wife for divorce on the ground of desertion. The answer denied desertion and set up that the husband sent her away from him, treated her without any consideration whatever, and refused to support her or to allow her to live with him. The court found for defendant and dismissed plaintiff's petition. The latter appealed.

A motion has been filed on the part of respondent to affirm the judgment because appellant's abstract of the record does not show that any bill of exceptions

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was filed nor that any appeal was granted. It is true appellant has filed no abstract of the record entries showing his leave to file, or the filing of a bill of exceptions, nor has he abstracted the record entries showing the steps taken below to perfect his appeal. But in the printed pamphlet purporting to be the "Statement, Abstract and Brief of Appellant" there appear statements showing that the appeal was duly taken and that his bill of exceptions was duly filed. If this document can be considered an abstract, then such statements as to the filing of the bill of exceptions and the taking of the appeal, are sufficient and the abstract need not contain the record entries showing these necessary steps, in the absence of a record showing to the contrary. Rule 26 adopted by this court January 6, 1913.

Respondent has also filed a motion to dismiss the appeal because appellant has failed to comply with Rule 15 of this court requiring him to deliver a copy of his abstract, brief, points and authorities to attorney of respondent at least twenty days before the day on which the cause is docketed for hearing at this term.

The judgment was rendered September 7, 1912, and the appeal was allowed to this court on the same day. The appeal was therefore returnable to the March term, 1913, of this court, and was set or docketed for hearing herein on March 10, 1913. The alleged abstract and brief were served upon respondent's attorney February 21, 1913, which was less than the twenty days required. The bill of exceptions was signed January 13, 1913, and appellant had from that date until February 18, 1913, in which to have said abstract and brief printed. This record is not large and ought not to require more than a few days to print. An affidavit has been filed which says the reason the abstract was not served in time is because the printer failed to finish same within the time he said he would when the manuscript was delivered to him. But the

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affidavit does not show when the manuscript was left with the printer, nor that the failure of such printer to get it done in time was his fault, or that he had a reasonable time in which to complete the printing thereof in time for proper delivery. The affidavit is insufficient. [Bradley v. Delaney, 121 Mo. App. 715, l. c. 717.] When proof is offered for the purpose of excusing a violation of an important rule, such proof should include every fact necessary to show that the one asking leniency was without fault. As said in Bradley v. Delaney, *supra*, it would be almost impossible for this court to dispatch the business before it if rule fifteen is not complied with. To allow it to become a dead letter would result in frittering away time given for the hearing and disposition of cases to the detriment of the administration of justice. Motion to dismiss sustained. All concur.

STATE OF MISSOURI, Respondent, v. CLEO
BURTON, Appellant.

Kansas City Court of Appeals, June 2, 1913.

1. **CRIMINAL LAW: Wife Abandonment: Elements of Crime.** To constitute one guilty of the offense of wife abandonment the evidence must show that the abandonment was without good cause and the criminal intent to abandon and to fail to support the wife must clearly appear.
2. **_____: _____: Evidence.** Where the evidence showed no unpleasant feeling between husband and wife and no intent on the part of the former to abandon the latter, the mere fact that the husband failed to keep his promise to come after his wife, who was on a visit to her father's home, coupled with the fact that the husband went off on a visit himself without notifying his wife where he was going, will not justify a conviction of wife abandonment where the wife was in her husband's home tenderly cared for by her husband's parents, and within a week after the husband's leaving the wife left her

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husband's home and replevined and took away the furniture given them by her father-in-law, and expressed a determination not to live with her husband again. In such case there is no evidence of the criminal intent to abandon and fail to support her.

Appeal from Daviess Circuit Court.—*Hon. Arch B. Davis*, Judge.

REVERSED.

John C. Leopard and Wilson & Wilson for appellant.

(1) The record in this case is wholly insufficient to support the verdict because the information fails to allege the county and State where the abandonment of the prosecutrix took place. There is no venue stated in the margin as required by section 5107, Statutes of 1909. The words "State of Missouri, county of Daviess, ss.," must appear in the margin to cure the defect of failure to allege the venue in the body of the information. The defendant's instruction in the nature of a demurrer to the evidence offered at the close of plaintiff's case should have been given. The evidence fails to show any criminal intent on the part of defendant or any intention whatever to abandon his wife, and further fails to show that defendant failed, neglected or refused to maintain and provide for such wife. *State v. Doyle*, 68 Mo. App. 219; *State v. Fuchs*, 17 Mo. App. 458; *State v. Lasley*, 151 S. W. 752. (2) The verdict of the jury is against the evidence because two elements are necessary to constitute the criminal offense of wife abandonment. The evidence must show beyond a reasonable doubt that the abandonment was without good cause and with criminal intent, and that the defendant also, with criminal intent, failed to provide for his wife. The evidence in this case wholly fails to show that the defendant abandoned his wife at all, and fails to show a

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failure to provide for her. On the contrary the evidence shows that the prosecuting witness was provided with a "good home" and with "plenty to eat" and that she "had never said anything to him about clothing but that he was intending to get her clothing at Easter time but that she left before that." If, then, there is any abandonment in this case the evidence shows that the prosecutrix abandoned defendant instead of defendant abandoning her. State v. White, 45 Mo. 512; State v. Brinkman, 40 Mo. App. 284; State v. Bruening, 60 Mo. App. 55; State v. Greenup, 30 Mo. App. 299; State v. Lasley, 151 S. W. 752.

George B. Padget for respondent.

It is not necessary to allege the venue in the body of the information; the venue is sufficiently laid in the caption and margin of the information, which will be taken, to be the venue for all the facts stated in the body of the information; and if the court should hold there is a defect, it is cured by the Statute of Jeofails. On this point see sections 5107, 5115 and 2119, R. S. 1909; State v. Hughes, 82 Mo. 86; State v. Simon, 50 Mo. 370; State v. Hunt, 190 Mo. 358 and refers to caption; State v. Dawson, 90 Mo. 149; State v. McDonough, 232 Mo. 227, 228.

TRIMBLE, J.—Defendant was convicted of wife abandonment and his punishment fixed at a fine of \$500 and six months' imprisonment in the county jail. At the time of his marriage he was a young man not quite of age and his wife was nineteen.

The statute under which he was prosecuted is section 4495, Revised Statutes of Missouri 1909, as amended by Session Acts 1911, page 193. It provides that "If any man shall, *without good cause*, abandon or desert his wife, . . . and shall fail, neglect or refuse to maintain and provide for such wife, . . .

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he shall . . . be punished, etc." To constitute the crime specified in this statute, there must be abandonment *and* failure to support or provide for the wife. The statute was not enacted to secure to wives the blessings and comforts arising from the constant and uninterrupted society of their husbands, but to prevent wives from being deserted and left destitute and in want, and liable to become burdens on the State because of the husband's violation of his marital and civic duties. Moreover, the abandonment must be without good cause and the criminal intent to abandon must be clearly shown. And the crime must be established beyond a reasonable doubt.

The prosecutrix and defendant, after their marriage, went to keeping house in Pattonsburg and remained there for two months until, on account of the extreme cold weather and the uncomfortable condition of the house they were in, they moved the larger part of their furniture to the home of defendant's father and mother. The parents were seemingly well-to-do people living on a farm, and it was entirely agreeable to them, as well as to the young couple, that this arrangement should be made. The young folks were to live there temporarily until the husband could make a home. The intention was to move to Kansas as soon as that arrangement could be made. While they lived thus with the old folks the latter furnished the provisions, which were ample and satisfactory, and to which no objection was made by anyone. The old folks treated the wife kindly and all of them got along without trouble of any kind. No trouble, or complaint or disagreement of any kind arose between the young husband and wife.

On March 2, the wife took some sewing and went to her mother's to make a visit of several days. No time was fixed for her return. The roads were extremely muddy and it was "considerable trouble to go backwards and forwards so much" to use the wife's

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language. Her husband told her when she got ready to come back to call him up over the phone and he would come for her. They were both pleasant and kindly to each other, no talk or hint of separation of any kind. This was on Thursday. On Sunday, the wife called him, and also on Monday and Tuesday. The first two times she called he gave some excuse for not coming, which was satisfactory to her, either the condition of the roads, which were still very muddy, or something else. And on Tuesday he told her he would come after her that afternoon "if the roads drain off." The husband and wife were seven or eight miles apart. He did not come, however, and she returned to her husband's home two days later but her husband was away. The old folks treated her kindly as before and she took her place in the home as usual. She asked where her husband was and the mother said she did not know. But no further inquiry was made by the wife as to his whereabouts. This was on the 9th of March. The old folks treated her well and they got along all right. The young wife, being pregnant, became sick and the mother-in-law waited on her, carried her meals to her when she was not able to go to the table, took care of her and did the best she could for her. The old gentleman sent for a doctor to come and see her while she was sick, and he came and left her medicine. The wife says she "supposes" the old gentleman paid the bill. On the 14th of March, which was the following Tuesday, she wanted to return to her mother's although nothing had been said to her by her husband's folks about going, and they had never said or done anything to hurt or offend her but had cared and provided for her. She told the old folks she was going, and went with defendant's brother in-law, Rollo Utz, to her mother's home. About the Saturday following, or at least between the 14th of March, when she left her husband's home, and the 20th of that month, she consulted a lawyer at Pattonsburg in ref-

erence to replevining the furniture and household goods in the room she and her husband had occupied at the home of the old folks. Acting on the advice she received, she went back on the 20th and demanded these goods. (These had been given to the young couple by the old gentleman when they were first married). The old gentleman told her she could have part of them—the rugs, table and dresser—and that if she thought she was treating him right, she could have the rest of them. The young wife says he didn't seem to want to give her all of them, so she said no more about it that evening. She left, and the next day obtained a writ and went down to the old man's with an officer and got all the goods. There was no row about it. She was allowed to take them. That same evening, after the prosecutrix had left with the goods, her husband came back on the five o'clock train to Pattonsburg and was waiting to go out to his father's. His wife heard that evening he had returned and that he was in Pattonsburg, but made no effort to communicate with him; nor did she afterwards. She "didn't feel like it was her duty to call him." And, although she saw him in Pattonsburg afterwards, she did not speak to him, or ask him to live with her, nor afterwards notify him of the child's birth. She testified that she met him on the street and passed right by him but did not speak to him. "I did not say anything to him, because I thought he ought to speak to me first. That is the reason I didn't speak to him. I didn't intend to humble myself to speak to him. I didn't think it was my place. I thought it was his place to come to me. I thought he could have wrote to me or let me know when he went visiting. I think I seen him every time I went to Pattonsburg after that. I never went back to the home he had prepared for me at his father's. I never wrote to him, or said anything, or asked him to come and see me. I had done that many times before we were married, but I didn't have to afterwards."

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Her complaint seems to be that her husband went visiting without telling her of his going, and that, although she went away from home in his absence and then within a week replevined the furniture given both of them by his father, still it was the husband's duty to hunt her up and not her's to say anything to him. She was asked:

Q. "Do you love this man? Do you want to live with him? A. No, sir; I don't. Q. No, you don't? A. No, sir. Q. Do you want him to help raise the baby? A. I would like to have him support it. Q. Don't you want him to live with you and you and he raise this baby? A. No, sir. He can support it if he wants to. Q. You are not willing that he live with you and her and help raise the child? A. No. Q. Why? A. The way he has done. Q. You have told the jury what he has done? A. Yes, sir. Q. Did he do anything you have not told the jury? A. No, sir. Q. It is all based on that? A. Yes, sir. Q. And you are not willing that he should live with you and the baby? A. He can support her if he wants to. Q. You are not willing to go back to his old father's and mother's where you were, and live there, *or go in a house by yourself and live with him, and raise the child?* A. No, sir."

The facts hereinabove given show clearly that the evidence is wholly insufficient to constitute the crime at which the statute is aimed. [State v. Doyle, 68 Mo. App. 219; State v. Lasley, 151 S. W. 752; State v. Fuchs, 17 Mo. App. 458; State v. Brinkman, 40 Mo. App. 248.] Defendant's demurrer to the evidence should, therefore, have been sustained.

It may be that the defendant failed to show that finer and more tactful consideration for his bride that he should have displayed. He may not have known exactly how a young and sensitive woman should be treated. Where is the young husband who does know? But if he doesn't, it does not follow that he shall be

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fined and put in jail on that account. The statute is aimed at the worthless wretch who vows to cherish and care for a woman and then, heartlessly and without cause, leaves her in her helplessness to the cold charity of the world. Against such, the statute should be more thoroughly enforced than it is; but it was not passed for the purpose of putting a club in the hands of one of a couple who cannot agree. Judgment reversed, and defendant discharged. All concur.

MERCHANTS NATIONAL BANK, Respondent, v.
GEORGE W. WITMER et al., Appellants.

Kansas City Court of Appeals, June 2, 1913.

NEGOTIABLE INSTRUMENTS: Judgment: Merger: Interest:
Future Actions. Where an indorsee and owner of a negotiable promissory note brings an action thereon against the maker, it becomes merged in the judgment and though all the interest due on the note is knowingly not claimed, no separate and independent action can be thereafter maintained on such note for the interest.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell*, Judge.

AFFIRMED.

Metcalf, Brady & Sherman for appellants.

Austin & Davis for respondent.

ELLLISON, J.—This action is on a negotiable promissory note and is brought by plaintiff bank as indorsee for value without notice. The trial court gave a peremptory instruction to find for plaintiff.

On the 31st of December, 1909, defendants executed to The American Case & Register Company their negotiable promissory note for \$1790.10, due in ninety

days, viz., the 31st of March, 1910, with six per cent interest from date. Before maturity, on the 13th of January, 1910, plaintiff bought the note of the Register Company. When this note became due, on the 31st of March, 1910, defendants presumably not knowing of the sale and transfer to plaintiff, executed a renewal note to the company for the same amount due in ninety days, with six per cent interest until paid. The company immediately duly indorsed this to the plaintiff, taking up the original.

It is difficult to understand the points made in defense, when considered with the facts conceded and the law of negotiable paper. It seems that defendants fear some one will lose a part of the interest on the note, or that they will be sued at some other time by the Register Company for a part of the interest. The plaintiff was paid the interest to maturity on the renewal note—the note in suit—when it was renewed, and while the petition asks judgment for the principal and interest from date, in point of fact interest was only claimed from maturity, and judgment only taken for interest from that time. Now as to what becomes of the interest from date up to maturity certainly ought not to concern defendants. Certainly no action can ever be maintained against them again for the note or interest. That has been closed out by the present judgment and is *res adjudicata*.

Defendants say that if they owe the note at all, they owe this unclaimed interest to some one and though plaintiff does not claim it, some one in the future might do so and thus they would be subjected to two actions instead of one. But when the holder and owner of the note brings an action against the maker and obtains judgment thereon, the note and all interest becomes merged in the judgment, and the maker cannot be again sued for some part of the interest that the owner did not claim.

Defendants question the *bona fides* of the sale of the note to plaintiff bank and contend it was merely for the convenience of the Register Company. We have gone over the evidence and offers of proof on this head and find nothing that could be accepted as having the slightest tendency to show that plaintiff was not an innocent purchaser for value before due and in the usual course. The trial court could do nothing less than give a peremptory instruction. The judgment was manifestly for the right party and is affirmed. All concur.

A. J. POOR GRAIN COMPANY, Plaintiff in Error,
v. FRANKE GRAIN COMPANY, Defendant,
FIRST NATIONAL BANK OF ENGLEWOOD,
Interpleader, Defendant in Error.

Kansas City Court of Appeals, June 2, 1913.

SALES: Assignment of Draft: Attachment: Ownership of Property. A purchaser of corn, buying in Kansas and selling in Kansas City, Missouri, paid therefor by checks on a local bank and indorsed and delivered to the bank a draft on the consignee, together with the bill of lading issued by the railway over which the corn was shipped. The corn was refused by the consignee and was attached by a creditor of the purchaser and sold by the sheriff. The bank filed interplea claiming the proceeds. *Held*, that the bank was the owner of the corn and entitled to the proceeds.

Error to Jackson Circuit Court.—*Hon. Jacob L. Lorie*,
Special Judge.

AFFIRMED.

Arthur E. Lybolt for plaintiff in error.

Ball & Ryland for interpleader and defendant in error.

ELLISON, J.—Plaintiff, in an action against defendant on an account, had the sheriff attach a car-load of corn in the possession of the Atchison, Topeka & Santa Fe Railway Company as a carrier of freight. The sheriff afterwards sold the corn for four hundred and twenty-five dollars, and the interpleader filed his interplea claiming the money. The judgment in the trial court was for the interpleader, and plaintiff appealed.

It appears that defendant was a grain company doing business in and near Englewood, Kansas, by purchasing from farmers and shipping and selling in Kansas City, Missouri. It arranged with the interpleader, a bank at Englewood, to cash checks which it would give for purchases and then when a shipment of grain was made it would draw a draft on the consignee, attach it to the bill of lading issued by the railway carriers and indorse it to the interpleader, who, in turn, would indorse it to its correspondent bank in Kansas City, to be paid by the consignee. But regardless of the general mode of transacting its business, the defendant in the present instance checked against the grain, interpleader honored the checks and, as indorsee, received the draft and bill of lading, which it indorsed to the First National Bank of Kansas City, Missouri. Defendant had sold the grain to the "Kansas City Grain and Seed Company" for four hundred and fifteen dollars, and the bill of lading with draft attached for that sum was to be taken up by that company, but payment was refused. Now it seems that the Kansas City Grain & Seed Company is really an individual named A. J. Poor, and that he, too, is this plaintiff, calling himself "A. J. Poor Grain Company," and that in some former dealings as A. J. Poor Grain Company he claims defendant owed him the account

upon which he brought this attachment. We have no concern with any controversy between him and defendant; the question we have to consider is whether the interpleader bank at Englewood became the owner of the grain when the bill of lading was indorsed over to it.

Answering this question, we find nothing in the evidence to justify any other conclusion than that interpleader is the owner. The points against that view are obscure and not easily understood, when compared with the evidence. It is first stated that interpleader's officers knew the grain had been sold in Kansas City; but they also knew that it had not been delivered when they took the bill of lading and draft and that they had a right to refuse delivery until the draft was paid. There is no room for question of good faith and notice to them; it was an ordinary commercial transaction whereby shippers and their assignees are made safe in the payment of the draft drawn against the shipment.

Then it is said that interpleader began suit against defendant for and on account of their dealings including the sum and item for which it now interpleads, which action was compromised and settled. But no such defense was made in the pleading and is therefore barred of consideration. But, aside from this, the evidence showed that the subject of the present controversy was not included in the settlement of the other claim, and that this particular claim has never been paid to interpleader.

The point as to there being no evidence that the grain was ever shipped on the carrier's cars when the bill of lading was issued, is without merit. It certainly was not shown that it had not been shipped. On the contrary we think every inference arising on the evidence is that it had been.

Neither is there any substance in the point as to an alleged alteration of the bill of lading.

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In addition to what we have written, it appears that plaintiff admitted the interpleader's case when the draft was presented and he offered to pay it if \$100 would be deducted on account of other deals with defendant. He further admitted that practically he procured the car to be brought over the State line into this State with the intent and purpose of bringing an attachment. We are not putting our decision on these grounds, but finding them in the record we deem them worthy of remark as throwing some light on the matter of justice between the parties. The judgment being manifestly for the right party, is affirmed. All concur.

MONROE P. BELCH and EDWIN SILVER, Appellants, v. EMIL SCHOTT, WILLIAM SCHOTT and CLARA KOCH, Defendants, JOHN F. HEINRICHS, Respondent.

Kansas City Court of Appeals, June 2, 1913.

1. **ATTORNEY'S LIEN: Client's Right to Compromise: Settlement Liquidates Amount of Attorney's Fees.** A client can compromise his case and settle it with or without the consent of his lawyers. And the amount of the fee will be liquidated by such settlement.
2. **CONTRACTS: Ambiguous Terms: Construction of.** When a contract is fairly open to two interpretations, one favorable to the party who wrote it, and the other to the opposite contracting party, then that construction will be adopted which is most favorable to the latter. Ambiguous terms in a contract are always to be construed against the party using such terms.

Appeal from Cole Circuit Court.—*Hon. John M. Williams, Judge.*

AFFIRMED.

A. T. Dumm for appellants.

T. S. Mosby for respondent.

TRIMBLE, J.—This is an action to enforce an attorney's lien alleged to be due plaintiffs under a written contract entered into by them with one John F. Heinrichs in which the latter employed the former to bring a suit to establish a certain writing as the last will and testament of the deceased wife of said John F. Heinrichs.

Said wife, Henrietta Heinrichs, was married prior to her marriage with John F. Heinrichs, and by her first husband had three children, the defendants Emil Schott, William Schott, and Clara Koch. After the death of her first husband, she married John F. Heinrichs, but had no children by him. She died leaving an estate in personality amounting to \$30,000 net. Under the law, her husband John F. Heinrichs was entitled to receive a child's share in such personality. [Sec. 349, R. S. Mo. 1909.] This would make his share under the law one fourth of the estate or \$7500. However, there was a certain writing dated April 7, 1909, purporting to be the last will and testament of Henrietta Heinrichs, deceased, in which, if genuine, she bequeathed \$500 to her son Emil Schott, \$500 to her son William Schott, \$500 to her daughter Clara Koch, \$200 to her church, and all the remainder of said estate to her husband John F. Heinrichs. This writing had been presented to the probate court and the same had been rejected as not being the will of said Henrietta Heinrichs, deceased.

Thereupon, John F. Heinrichs employed plaintiffs as attorneys to bring suit to establish said will in solemn form, and entered into the following contract with them:

"This memorandum agreement made this November 11, 1909, witnesseth: That John F. Heinrichs (having retained M. P. Belch and Edwin Silver as his attorneys in a cause pending in the circuit court of

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Cole county to establish a certain paper writing executed April 7, 1909, as the last will and testament of Henrietta Heinrichs, deceased), does agree and contract to pay said M. P. Belch and Edwin Silver (to be divided equally between them) fifteen per cent of the value of the estate realized by said John F. Heinrichs as the result of the suit or litigation (or by compromise) to establish said will, provided said will is established.

"Said M. P. Belch and Edwin Silver agree on their part to prosecute said cause through all the courts as the same may be necessary for the final termination of said litigation in favor of said John F. Heinrichs.

"If said will is not established then said John F. Heinrichs will pay said M. P. Belch and Edwin Silver 7½ per cent of what he receives from said estate.

"JOHN F. HEINRICHES,
"M. P. BELCH and
"EDWIN SILVER."

Plaintiffs as attorneys for John F. Heinrichs brought suit in the circuit court to establish said alleged will, which suit was duly tried and resulted in the jury returning a verdict establishing the writing as the will of said deceased. The defendants in that suit filed a motion for new trial which was sustained by the court. Thereupon, the plaintiff therein, John F. Heinrichs, through his attorneys, who are plaintiffs here, appealed the case to the Supreme Court of Missouri. While the same was pending in that court, Heinrichs, without the knowledge of his attorneys, compromised the case, dismissing in person his appeal in the Supreme Court and then dismissing the suit in the circuit court. He was to receive in compromise the sum of \$14,700 in cash, and obtained the release and satisfaction of a certain judgment against him for \$2940.80 held by a bank in Jefferson City. (Of the \$14,700, above mentioned, the three defendants still

owe and have in their possession the sum of \$10,000 which they have not paid to said Heinrichs.)

The plaintiffs had taken the necessary steps to preserve their attorney's lien under the statute, and when they learned of the compromise, they demanded fifteen per cent of the full amount received, or to be received, by said Heinrichs on said compromise to-wit, \$17,640.80. Being refused, they brought this suit to establish their lien on the \$10,000 yet in the hands of the three heirs for the sum of \$2621.20, being fifteen per cent of \$17,640.80, the full amount due Heinrichs as aforesaid.

The execution of the contract, the prosecution of the suit to establish the will and the compromise thereof and all the other facts necessary to establish plaintiff's right to a judgment in some amount are admitted.

The contest is over the construction of the contract. Plaintiffs claim that under it they are entitled to fifteen per cent of the \$17,640.80, being the entire amount going to Heinrichs, while the latter claims that under the law he was entitled to one fourth of the estate at all events without regard to the litigation attended to by plaintiffs as his attorneys; that by the compromise he obtained one-half of said instead of one-fourth, and, therefore, the amount realized by him as a result of the litigation is the one-fourth he obtained over and above the one-fourth he would have received had there been no litigation. Consequently he insists that he owes plaintiffs only fifteen per cent of this additional one-fourth obtained by the suit and compromise. Heinrichs also alleged in his answer that he was advised and informed by plaintiffs, especially by Belch, at the time of signing the contract that such was its meaning; that Belch had been his adviser prior to the signing of said contract and that in signing it he relied on the representations of Belch as to the meaning and construction to be placed on said contract. His

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testimony, however, does not bear this out. Even if true, it shows nothing more than that he took this construction of the contract for granted when he signed it. But the overwhelming weight of the testimony is that nothing was said about the construction to be put upon the contract, and Heinrichs' conduct thereafter was not in accord with such alleged representations on the part of his attorneys as he claimed.

The trial court construed the contract as meaning that the fifteen per cent applied, not to the entire amount received by Heinrichs under the compromise, but to the amount received by him over and above what he was entitled to under the law, that is, that before the fifteen per cent is computed, the amount Heinrichs would have received anyway must be deducted from the whole amount. The judgment, therefore, gave plaintiffs fifteen per cent of \$2940.80 amounting to \$441.12, and fifteen per cent of \$7350 (said amount being the \$14,700 less \$7350, the one-fourth due him by law) amounting to \$1102.50, and amounting in the aggregate to \$1543.62 and established it as a lien on the \$10,000 due Heinrichs from, and in the hands of, the other defendants. Plaintiffs appealed, claiming that under the contract they are entitled to fifteen per cent on the full \$14,700 instead of \$7550.

There is no controversy over the right of Heinrichs to compromise his case and settle it with or without the consent of his lawyer. Plaintiffs concede this. At least, they make no complaint on this score. And the amount of fee will be liquidated by such settlement. [Hurr v. Metropolitan St. Ry. Co., 141 Mo. App. 217, l. c. 222.]

The plaintiffs in this case, at the time the contract was prepared, were lawyers of skill and ability. The defendant Heinrichs was a layman. The contract was drawn up by the plaintiffs and presented to and signed by the defendant. If it is ambiguous or fairly open to two interpretations, one favorable to those

who wrote it and the other to the opposite contracting party, then that construction will be adopted which is most favorable to the latter. [Lechner v. Strauss, 98 N. E. 444, l. c. 448; 9 Cyc. 590; Ford v. Clement, 135 S. W. 343.] Ambiguous terms of a contract are always to be construed against the party using them. [Minge v. Green, 58 So. 381.] The reason of this rule is that men are supposed to take care of themselves, and he who selects the words by which a right is given ought to be held to a strict interpretation of them rather than he who merely accepts them. [Gillet v. Bank, 55 N. E. 292, l. c. 294; Staten Island v. Spearin, 134 N. Y. Sup. 98.]

It is true the object to be attained in construing a contract is to get at the intention of the parties. And the real intention may control the letter of the contract, or the strict letter may be abridged or enlarged so as to give effect to that intention as gathered from the whole contract when read in the light of the circumstances under which it was executed. [Union Depot Co. v. Railway, 113 Mo. 213, l. c. 225.] When it is said that the object in construing a contract is to get at the intention of the parties, it is meant, of course, that intention as expressed in the language the parties thereto use to express it and consistent with such language. [Ellis v. Harrison, 104 Mo. 270, l. c. 279.]

The difficulty in construing this contract, by getting at the intention of the parties in the light of the circumstances, lies in the fact that their intention will apply equally as well to one construction as to the other. Of course it might be said that naturally plaintiffs would intend the larger compensation should be due them, and hence their intention was that fifteen per cent should be paid on the entire amount going to Heinrichs. At the same time it cannot be said they would not have accepted the lesser compensation based on the other construction. In fact, they were dealing

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with a careful, economical German who had refused to sign a contract for a larger fee. And according to Heinrichs' testimony, when he signed the contract in their presence he remarked, "It will be all right. I will only have to pay seven and a half per cent of what I get." So that it cannot be said with certainty the circumstances and situation of the parties show the intention of the contract was as plaintiffs claim it was. In fact, if Heinrichs make the remark above quoted when he signed the contract, the circumstances show that, so far as he was concerned, his intention was to construe the contract as providing the lesser compensation. This construction is in strict accord with the literal meaning of the word used. The contract provides that defendant was to pay plaintiffs fifteen per cent of the value of the estate "realized by said John F. Heinrichs as the result of the suit or litigation (or by compromise) to establish said will, provided said will is established." Of course, strictly speaking, the amount *realized* by Heinrichs as the *result* of the litigation or compromise was not the total amount coming to him, but the excess he received over and above what was due him under the law without regard to the suit. So that, according to the strict terms of the contract, plaintiffs were to get fifteen per cent of this excess and not of the whole. When we look at the object of the contract and the situation of the parties in order to determine their intention, it is seen that these comport as well with such strict construction as with any other. And acting upon the rule that where a contract is open to two possible interpretations, one favorable to the party drawing the contract and the other favorable to the opposite party thereto, that construction is adopted which is least favorable to or more strongly against the party drawing the contract, we must hold against plaintiffs' contention. The judgment is, therefore, affirmed. All concur.

MAGGIE CONNER, Respondent, v. THE LIFE & ANNUITY ASSOCIATION, Appellant.

Kansas City Court of Appeals, June 2, 1913.

1. **FRATERNAL BENEFICIARY ASSOCIATIONS: Warranties: Fraudulent Representations.** The question of false and fraudulent representations in securing an insurance policy, in an action to recover the amount of the death claim, is one of fact to be determined by the jury.
2. **—: Foreign Society: Evidence.** Where a fraternal beneficiary society incorporated in another State fails to prove that, at the time the policy, upon which suit is brought, was issued, it was authorized to do business in this State as a fraternal beneficiary society, the laws pertaining to old line life insurance govern the action.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn, Judge.*

AFFIRMED.

Metcalf, Brady & Sherman for appellant.

E. W. Taylor and Charles Brown for respondent.

JOHNSON, J.—This is an action on a policy of life insurance, dated December 6, 1910, and delivered to Harry Conner, the assured, December 17, 1910. Conner was twenty-one years of age, unmarried and plaintiff, his mother, was made his beneficiary. He died at his mother's home in Kansas City, December 29, 1910, twelve days after the delivery of the policy to him. The answer alleges that defendant is a fraternal beneficiary society, incorporated in the State of Kansas and licensed to do business in this State, but defendant failed to prove that at the time the policy was issued it was authorized to do business in this State as a fraternal beneficiary society and the court properly treated the action as being founded on

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an ordinary policy of life insurance. [Gruwell v. Knights & Ladies of Security, 126 Mo. App. 496; Newland v. Modern Woodmen, 153 S. W. Rep. 1097; 168 Mo. App. 311; State ex rel. v. Vandiver, 213 Mo. 187; Schmidt v. Foresters, 228 Mo. 675.]

The principal defense is that Conner made false and fraudulent representations in obtaining the policy and that the matter thus misrepresented "actually contributed to the contingency or event on which the policy became due and payable" within the statutory meaning of that term. [Sec. 6937, Rev. Stat. 1909.]

The alleged false statements are found in the written application signed by Connor which, by the terms of the policy, was made a part of the contract. In the application which was signed and delivered November 30, 1910, Conner stated that he was in sound health, had no disease that would tend to shorten his life, had not suffered from spitting or coughing blood or from any chest or lung disease, and never had been "under treatment at any asylum, cure or sanitarium." Further he stated that his name was Harry Conner, that his father was forty-two years old and in good health, and that he had one sister who was twenty-four years old and in good health. The young man's real name was Harry Williams and his father had been dead thirteen years, his stepfather's name was Conner and he had adopted and had been known by that name. His only sister would have been twenty-four years old had she been living but she had been dead five or six years.

Defendant introduced evidence tending to show that at the times of his application and of the delivery of the policy Conner was in an advanced stage of pulmonary tuberculosis and knew that the statements relating to his health which we have quoted were untrue. He was confined at home by the disease for ten days preceding his death and the attending physician who was called in a week before he died testified that

he died of tuberculosis of the lungs. On March 1, 1910, he was admitted to the "Volker Pavilion" in Kansas City, a charitable institution for the treatment of sufferers from tuberculosis, and remained there three months under the care of the physician in charge who testified that "when he came there he had been losing weight; he had some hemorrhages and he had a very bad cough. While he was there he put on several pounds. I think he went up from about 111 pounds to 120 pounds, and he had a decrease in the number of hemorrhages that he had, and a decrease in his cough." The witness diagnosed the case as one of pulmonary tuberculosis that had reached an incurable stage.

On the other hand the report by defendant's examining physician of an examination of the applicant on November 30, 1910, contains these statements: "Actual weight 135 lbs. Height 5f. 7 in. . . . Q. If over or under weight, is it a family characteristic? A. Yes. Q. Does he appear careworn or older than age stated? A. No."

"Girth of chest (under vest) deep expiration 28 inches; full inspiration 31 inches; girth of abdomen at waist line 29 inches. Q. Is his appearance healthy? A. Yes. Figure! Fine." . . . Lungs. Q. Is the respiratory murmur clear and distinct over both lungs? Yes. Is the respiration full, easy and regular? Yes. Number per minute? 19. Do you find any indication of disease of the lungs, throat or bronchial tubes? No. . . . Do you find anything unfavorable in the applicant's physique, occupation, habits or circumstances of life? No. Do you consider the risk first class, or good, or only fair? First class."

Plaintiff testified that the father of the assured died of dropsy and his sister of "the grippie;" that she did not know the cause of her son's death, and that before that event she had no information or knowledge that he had tuberculosis. She denied positively

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that he had hemorrhages or ever coughed or spat blood. She stated that prior to his last illness, which lasted about ten days "he was a stout, healthy enough looking boy" and generally weighed about one hundred and thirty or one hundred and forty pounds. We quote from her testimony: "Q. And had Harry always lived with you during his life? A. Yes, sir. Q. Had he ever had any serious illness or disease of any kind? A. No, sir. Q. There has been—I think you heard Dr. Clendenning telling about Harry's being out there at the Volker pavilion, here in Kansas City. What do you know about his going out there? How did that happen? A. Harry had kind of run down and he went out there for the outdoor air and diet treatment. Q. Before he went out there had he any doctor? A. He had not. Q. How did he happen to try that plan? How did he happen to go out there? A. He did, too—a little bit the doctor treated him, just for a short time, and he advised me to send him out there. . . . Q. (By Mr. Taylor): You say he went out to this Volker pavilion? A. Yes, sir. Q. How often did he come home to see you? A. As much as once a week and sometimes oftener. Q. Did you occasionally go out there to see him? A. Yes, sir. Q. What effect did the rest out there seem to have on him? A. It seemed to help him. He kept quieter, and gained in flesh."

Young Conner worked as a clerk in a grocery store and a pool hall attendant until ten days before his death. The proprietor of the pool hall stated that he saw Conner five or six hours every day, that he appeared to be in good health, had never coughed or spat blood or had hemorrhages and exhibited no indications of consumption or impaired health.

The court overruled the demurrer to the evidence offered by defendant and gave the following instruction at the request of plaintiff: "The court instructs the jury that it is a question for the jury to determine

whether or not Harry Conner made any misrepresentation to the defendant in obtaining or securing the policy of insurance on his life, sued on in this case, and it is also a question for the jury, if you find that any misrepresentation was made, to determine whether or not the matter misrepresented, if you so find, actually contributed to his death. And unless you shall find that Harry Conner did make misrepresentation in obtaining or securing the policy of insurance on his life, sued on in this case, and unless the matter misrepresented shall have actually contributed to his death, then your verdict must be for the plaintiff."

The jury returned a verdict for plaintiff and after its motions for a new trial and in arrest of judgment were overruled, defendant appealed.

Section 6937, Rev. Stat. 1909, provides: "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this State, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury."

Counsel for defendant argue that this statute does not apply "to a willfully fraudulent misrepresentation. The law recognizes a distinction between a misrepresentation and a fraudulent misrepresentation and does not apply to a case where misrepresentations were knowingly false and made with a view to deceive or mislead the company."

We so decided in *Ashford v. Ins. Co.*, 80 Mo. App. 638 and in *Van Cleave v. Casualty Co.*, 82 Mo. App. 668, where we held that insurance obtained by any fraud remediable at law or in equity may be avoided on a proper showing of the fraud and that the statute on representations does not preclude the defense of fraud in obtaining a policy. But those cases on which

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much stress is laid by defendant were expressly overruled by the Supreme Court in *Kern v. Legion of Honor*, 167 Mo. 471, and the statute was interpreted as intending to ignore all distinctions between innocent and fraudulent misrepresentations in applications for insurance policies and of making a jury question of every issue of misrepresentation and of the effect thereof on the "contingency or event on which the policy is to become due and payable." During the life of the insured but not afterwards the company may sue to set aside a policy on the ground that it was procured by fraud.

This statute applies to the case in hand. [*Gruwell v. Knights, etc., supra*; *Newland v. Modern Woodmen, supra*; *Schuermann v. Ins. Co.*, 165 Mo. 641; *Kern v. Legion of Honor, supra*.] And the question presented for our determination by the demurrer to the evidence is whether or not we should declare as a matter of law, first, that misrepresentations as to material facts appear in the application and, second, that they actually contributed to the event on which the policy became payable. The statute expressly provides that such questions are for the jury to determine. As is said by the Supreme Court in *Keller v. Ins. Co.*, 198 Mo. l. c. 463: ". . . the question of false and fraudulent representations in securing such policy in an action to recover the amount of the death claim, must be governed by the provisions of section 7890, and as to whether the misrepresented matters in the application for insurance contributed to the happening of the contingency insured against, are questions of fact to be determined by the jury to whom such facts are submitted."

In *Benson v. Insurance Co.*, 161 Mo. App. 480, we held that the evidence showed in law "that deceased died of the disease misrepresented," but that ruling was based on uncontradicted evidence so clear and in-

disputable that no reasonable mind could doubt it. Where there is any room at all in the evidence for a reasonable difference of opinion about either of these issues the statute intends that the question shall go to the jury as one of fact.

The proof of misrepresentations as to matters of family history is clear and indisputable but those facts do not appear to have had any connection with the event which created a liability under the policy and therefore may be passed with the observation that they have nothing to do with the case. The proof, offered by defendant to the effect that the applicant died of tuberculosis and was afflicted with that disease at the time he signed the application and, therefore, was not in sound health when he received the policy, is strong, but by no means conclusive. Defendant's regular examining physician made a thorough examination of the young man and found no traces of a disease, the presence of which, especially in its last stages is not difficult to discover. Such evidence certainly is strong enough to raise an issue of fact with the testimony of the physicians who were introduced as witnesses by defendant. Opinion evidence is only advisory and should not be given conclusive weight especially in instances where it is contradicted by other evidence. The testimony of persons who associated with Conner daily should not be cast aside as wholly devoid of evidentiary strength and, if accepted, it tends to show that Conner did not die of tuberculosis nor have that disease.

We, therefore, conclude that the issues of the cause of his death and of the relation of the alleged misrepresented facts to that cause were issues for the jury to solve. We may concede a misrepresentation as to the fact of the applicant having been under treatment in "an asylum, cure or sanitarium" but the facts of whether he had consumption while there, was treated for that disease, or merely took a rest and

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diet treatment for his general health, or was treated for a disease that contributed to his death, are matters of dispute in the evidence that, under the statute, were questions for the jury. The court committed no error in overruling the demurrer to the evidence and correctly defined the jury issues in the instruction we have quoted.

The judgment is affirmed. All concur.

STATE OF MISSOURI, Respondent, v. JAMES LEAVER, WREN BUGG, and THOMAS CARTER, Appellants.

Kansas City Court of Appeals, June 2, 1913.

1. **CRIMES AND PUNISHMENTS: Billiard and Pool Tables:** Kelly Pool. If a pool table is used for gambling purposes, it is a gaming table within the meaning of the statute (Secs. 4752 and 4753, R. S. 1909), whether the game played upon it be Kelly pool, poker or craps.
2. **—: Owners of Pool Hall: Permitting Gambling.** It is immaterial that the defendants did not gamble themselves. If they allowed the pool tables to be used by their customers in playing games of chance for money or property, they violated the statute (Sec. 4753, R. S. 1909).
3. **—: Information: Language of Statute.** An information is good if it charges an offense in the language of the statute.
4. **—: Misconduct of Prosecuting Attorney: Failure to Rebut.** When counsel go outside of the record in their arguments to juries and indulge in assertions of facts that are not relevant to the issues and which are calculated to cause the jury to disregard the real merits of the case, the failure of the trial court to give proper heed to objections of opposing counsel, will constitute reversible error.

Appeal from Boone Circuit Court.—*Hon. D. H. Harris,*
Judge.

REVERSED AND REMANDED.

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Don C. Carter and *N. T. Gentry* for appellants.

E. C. Anderson and *George S. Starrett* for respondent.

JOHNSON, J.—On information of the prosecuting attorney of Boone county, James Leaver, Thomas S. Carter and Wren Bugg were tried for a violation of section 4753, Revised Statutes 1909. A *nolle prosequi* was entered as to Carter and the jury returned a verdict of guilty as to the remaining defendants, assessing a fine of one hundred and fifty dollars against Leaver and a fine of fifty dollars against Bugg. Motions for a new trial and in arrest of judgment were filed and overruled and both defendants appealed.

The information charged that "James Leaver, Thos. S. Carter and Wren Bugg on or about the 20th day of December, 1911, at the county of Boone, State of Missouri, did unlawfully permit a certain gaming device commonly called a pool table, designed and used for the purpose of playing games of chance for money and property, to be used for the purpose of gaming in a certain building there situate and under the control and in the possession of said James Leaver, Thos. S. Carter and Wren Bugg," etc.

Carter owned a building in the city of Sturgeon in which a pool hall was being conducted and also owned the pool tables, balls and cues and other personal property used in the business. Leaver had leased the building and contents from Carter and was the proprietor of the business. He was in other business which engrossed his attention during business hours and he employed Bugg to run the pool hall during his absence. The evidence of the State discloses that Bugg, while in full charge and control of the place, allowed certain patrons to play a game called "Kelly pool" for money stakes. This game is played on a pool table with numbered billiard balls and cues and a bottle containing very small balls numbered to correspond with the num-

bers on the billiard balls is used at the beginning of a game to assign to each player a particular ball to play. The player who first succeeds in pocketing his ball wins the game and the stakes. Leaver frequently spent his evenings at the pool hall and had knowledge that Kelly pool was being played on the tables for money, but neither he nor Bugg participated in the gambling nor received other remuneration than the usual fee charged for an ordinary pool game.

The offense prohibited by section 4753, Revised Statutes 1909, "is the permitting any gaming device to be used for the purpose of gaming in any house belonging to, occupied by, or under the possession, or control, by anyone . . . if the defendant knowingly permitted the gaming device, described in the indictment, to be used for gaming purposes in his house, then he has violated the statute." [State v. Dyson, 39 Mo. App. 297.]

It is immaterial that defendants did not gamble themselves. If they allowed the pool tables to be used by their customers in playing games of chance for money or property they violated the statute.

Counsel for defendants attack the information on the ground that in omitting any reference to the use of balls and cues and in treating a pool table as, of itself, a gaming device, the information fails to charge a statutory offense. It is argued that sections 4750, 4751, and 4753 are *in pari material*, must be construed together and that a bare pool table does not come within the vicious devices defined in section 4750. We agree with counsel that pool tables are harmless when innocently used; so are playing cards, but either may be used in gaming and it is such use the statutes are designed to suppress. Section 4752, which was enacted in 1909, makes it a misdemeanor "for any person to play for money at any billiard game, pool game, or any other game played upon a table and upon which balls and cues are used."

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This statute has reference only to games played with balls and cues and obviously was not intended to restrict the scope of the offenses defined in section 4753. The term "any gaming table" used in the latter statute means any table that may be used for playing games of chance for money or property and the offense consists in using such table "for the purpose of gaming," the word gaming being employed as the synonym of gambling. [State v. Shotts, 143 Mo. App. 346.] If a pool table is used for gambling purposes it is a gaming table within the meaning of the statute, whether the games played upon it be Kelly pool, poker or craps, just as a deck of cards is a gambling device whether used in playing poker, pinocle, or bridge whist for money. In State v. Mathis, 206 Mo. 604, the defendant was convicted on a charge of "setting up and keeping divers gaming tables and gambling devices, to-wit, two poker tables . . . which were adapted, devised and designed for the purpose of playing games of chance for money or property." The court say in the opinion:

"Counsel for defendant lay much stress upon the fact that the game of poker does not require a table or device of a certain kind, and specially adapted, devised and designed for the playing of the game of poker alone. Nor was it necessary that the table should be *specially* adapted, devised and designed for the purpose of playing poker alone. The statute should not be given any such restricted meaning. It prohibits the setting up or keeping '*any kind of gambling table or gambling device*, adapted, devised and designated for the purpose of playing any game of chance for money or property,' and the inducing, enticing or permitting '*any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device*,' always putting it in the disjunctive. It makes no difference whether the table on which the game of poker

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was played was a gambling device or not; if it was a table, adapted, devised and designed for the purpose of playing any game of chance for money or property, and the defendant permitted any person to bet or play upon such table, he is guilty as charged. That the poker table, so called, was adapted and designed for the purpose of playing games of chance is clearly shown by the fact that games of poker were played thereon, in some of which at least the defendant participated."

We held in State v. Shoots, *supra*, that "betting on a game of pool played upon a billiard table constitutes such table a gambling device." [State v. Jackson, 39 Mo. 420; State v. Dyson, *supra*.] It is the betting on a game of chance played on a table set up or used for that purpose that makes the table a gambling device within the meaning of section 4753, and not the character of the game played on such table, and, as we have said, the offense defined by that statute consists of permitting a gaming table to be set up and used for gaming and not of permitting any particular game of chance to be played.

Moreover, the information charges the offense in the language of the statute and the general rule is that an indictment on information charging the commission of an offense created by statute is good if it follows the language of the statute. The rule does not apply in instances where the statute uses generic terms and does not state the offense "with such particularity as to notify a defendant of what he is to defend against." [State v. Ramsauer, 140 Mo App 401.] The present information falls within the rule and not the exception since it notified defendants to defend against a charge embracing all the essential elements and particulars of the statutory offense.

The closing argument of the prosecuting attorney provoked a number of objections from counsel for defendants, all of which were overruled. Among the

remarks to which objection was made was the following: "Boys can play in there and on up to men as baldheaded as I." Counsel for defendants objected, saying, "there is no testimony that any minors have played in this place." By the Court: "The objection is overruled. Don't interrupt the attorney." Counsel for defendants excepted.

Defendants were not on trial for the offense of permitting minors to play in their pool hall. The evidence did not accuse them of that offense and if it had, such accusation would have been extraneous to the issues tendered by the information. The prosecuting attorney went entirely beyond the issues of the case in charging defendants with having violated another law, and we assume that he accomplished the only purpose such argument would have, viz., to influence the minds of the jury and prejudice them against the defendants. The rule is too well settled to call for the citation of authorities that counsel must keep within the record in their arguments to juries, and when they fail to do so and indulge in assertions of facts that are not relevant to the issues under investigation and which are calculated to cause the jury to disregard the real merits of the case, the failure of the trial court to give proper heed to timely objections of opposing counsel will constitute reversible error. [State v. Zorn, 202 Mo. l. c. 44; State v. Wigger, 196 Mo. l. c. 103; Bishop v. Hunt, 24 Mo. App. l. c. 377; State v. Upton, 130 Mo. App. l. c. 320.]

The court erred in not sustaining the objection and in not administering a proper rebuke to the offending attorney.

We find no other error in the record but for that noted the judgment is reversed and the cause remanded.

All concur.

REBECCA KNODE, Plaintiff in Error, v. MODERN
WOODMEN OF AMERICA, Defendant in Error.

Kansas City Court of Appeals, June 2, 1913.

1. **FRATERNAL BENEFICIARY ASSOCIATIONS: *Ipsa Facto Suspension: Forfeiture.*** Provisions, in the laws of a fraternal society for the prompt payment of benefit assessments and prescribing a self-executory suspension and forfeiture of insurance as a penalty for failure to make prompt payments, are reasonable and will be enforced by the courts.
2. **—: Failure to Pay Dues: Suspension: Notice to Member.** Where the contract, as evidenced by the certificate, constitution, and by-laws, of a fraternal society, does not make the provisions for the prompt payment of dues and assessments self-executing, but merely provides that a failure to pay shall constitute a ground for suspension and forfeiture, it does not become effective until the forfeiture and suspension are declared by the order and notice of such action given the delinquent member.
3. **—: Waiver: Dues Paid by Lodge.** Where the laws of the order do not authorize subordinate lodges to pay dues of members during sickness or allow such lodges or their officer to make agreements that would alter or waive any of the general laws, the promises and representations of the clerk of a local lodge that a member's dues will be paid by the lodge during his illness, does not constitute a waiver of the laws of the order requiring prompt payment of dues.

Error to Jackson Circuit Court.—*Hon. James H. Slover, Judge.*

AFFIRMED.

B. D. Smith and John Sullivan for defendant in error.

*E. W. Shannon and Botsford, Deatherage & Creas-
son* for plaintiff in error.

JOHNSON, J.—This is an action on a death benefit certificate issued by defendant to James S. Knod, November 19, 1902. It is conceded that defendant is

a fraternal beneficiary society incorporated in Illinois and authorized to do business in this State and that the certificate should be treated as a fraternal beneficiary contract. Knod joined the order at Kansas City and died in that city on January 23, 1904. Plaintiff was his mother and one of the beneficiaries named in the certificate. The defenses interposed in the answer are founded on the alleged fact that a lawful assessment levied by defendant for the month of March, 1903, and payable on or before the first day of the following month was not paid, and on the conceded fact that the dues and monthly assessments for the succeeding months to the date of Knod's death were not paid by him or for him. The first defense is that the failure to pay the March assessment, *ipso facto*, suspended him as a member and forfeited the insurance and the other defenses are based on the theory that in failing to pay or offer to pay the subsequent dues and assessments, Knod acquiesced in his suspension and the forfeiture of his certificate and abandoned his insurance.

Plaintiff contends and her evidence tends to show that Knod paid the assessment for March, 1903, in the time required by the contract. She concedes that the subsequent dues and assessments were not paid by him but states and is corroborated in the statement by another witness, that the clerk of the lodge of which her son was a member repeatedly assured her, during her son's last illness, which began in the fall of 1902, that the lodge would pay the dues and assessments and during the period of the alleged abandonment of the contract repeated the assurance and told her that the lodge had been keeping up the payments. Her evidence does not show that any of the superior officers of the order knew of these promises or that they were made in pursuance of any custom of the local lodge, known to or acquiesced in by the supreme

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lodge or its officers. The fact that such promises were made is disputed in the evidence of defendant.

The certificate states that it is issued in consideration of the agreement of the member "to pay all assessments and dues that may be levied during the time he shall remain a member of this society," that failure to pay a monthly assessment "on or before the first day of the month following the date of the notice of levy" shall forfeit the certificate, and further provides that "this certificate and contract is and shall be subject to forfeiture for any of the causes of forfeiture which are now prescribed in the by-laws of this society."

The by-laws require that notice of monthly assessments shall be given in the official paper published by the society, a copy of which shall be mailed to each beneficial member and that "mailing copy of paper shall be notice to member of assessments." The by-laws relating to the suspension of a member and the forfeiture of his certificate states that "every beneficial member when so notified that a benefit assessment has been levied and ordered collected by the board of directors, who shall fail to pay same on or before the first day of the month following the date of said notice . . . shall *ipso facto* become suspended and during such suspension his benefit certificate shall be absolutely null and void." Another section forbids the clerk of a local camp from collecting or receiving payment of assessments or dues from a suspended member "if, at the time tender was made, the member was in impaired health, nor unless furnished with a warranty of good health."

Reinstatement of a suspended member is allowed by the by-laws within sixty days after suspension for nonpayment of assessments, fines or dues on the payment of all arrearages, provided that "he be in good health at the time of reinstatement and furnish to the clerk of this local camp a written warranty to such

effect, signed by himself, which said warranty shall be immediately transmitted by the local clerk to the head clerk and thereupon the head clerk shall file the same and notify such member of his reinstatement."

Reinstatement after sixty days and within six months after suspension is allowed on payment of all arrearages, passing a medical examination by the camp physician, and the payment of certain small fees. Plaintiff, who was living with her son during his last illness, testified that he did not receive any copies of the official paper through the mail or otherwise and had no notice from defendant of his suspension.

Only a small part of the evidence heard at the trial is included in the abstract and we are left in the dark as to the evidence bearing on many of the important issues contested at the trial. We shall regard all such issues as having been properly resolved in favor of defendant and, therefore, assume that the official papers published by defendant were mailed to the last known address of Knode.

At the request of plaintiff the jury were instructed that although they might "believe from the evidence that the assessment claimed by the defendant to have been due and payable during the month of April, 1903, was not paid by the said James S. Knode or anybody for him, yet, if the jury believe that the defendant by its acts and conduct as shown by the evidence led the said Knode to believe that a forfeiture would not be insisted upon her failure to pay said assessment, then the defendant has waived such alleged forfeiture and it cannot constitute any defense to this action."

Among the instructions given at the instance of defendant were the following: (1) "The court instructs the jury that even if you find from the evidence that Mr. Knode or some one for him tendered or paid his assessment for April, 1903, that if you find

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that between May 2, 1903, and January 23, 1904, being the date of his death, Mr. Knod did not pay or offer to pay further dues or assessments, nor take any action towards disaffirming his suspension, then Mr. Knod must be held to have abandoned his membership and acquiesced in his suspension; and your verdict must be for the defendant (unless you find said payments were waived by defendant.)" The part in parentheses interlined by the court.

"(4). The court instructs the jury that even if you find from the evidence that Mr. Knod, or somebody for him, paid the April, 1903, assessment prior to May 1, 1903, and that he was illegally and improperly suspended, that unless you find from the evidence that he made some effort to gain his rights of membership in the society, prior to his death, he must be holden to have acquiesced in such suspension and to have abandoned his membership; and your verdict must be for the defendant, provided you further find from the evidence that notice of his suspension was mailed to his regular address (and received at such address) prior to the death of said James S. Knod." The part in parentheses interlined by court.

"(5) The court instructs the jury that defendant is a fraternal beneficiary society, and that the application for membership, benefit certificate and by-laws in force during the time involved in this case, were each and all included in and constituted the contract between the members of the society, and that each was bound by all of the terms and conditions therein included."

The jury returned a verdict for defendant and the case is here on a writ of error sued out by plaintiff.

The errors assigned by counsel for plaintiff relate to the instructions given at the request of defendant but in our view of the case it will not be necessary to speak of these assignments. We shall take plaintiff on the ground of her own selection and concede that

the assessment for March, 1903, was paid by her son in proper time and, therefore, that the defense resting on the contrary assertion must fall, and, further, we shall assume that no notice of suspension was given by defendant on account of the failure of Knode to pay the March assessment or the dues and assessments subsequently levied each month.

But with these concessions we think the evidence of plaintiff shows that her son was not a member in good standing at the time of his death and that the certificate had become forfeited because of his failure to pay the dues and monthly assessments that accrued from April, 1903, to the date of his death in the following January. We do not agree with counsel for plaintiff that his suspension could not become effective until he had received notice of it from defendant. The by-laws did not require defendant to give notice of suspensions or forfeitures, but on the contrary, provided that a failure to pay assessments and dues at stated times should, *ipso facto*, constitute a suspension and forfeiture.

Provisions in the laws of a fraternal society for the prompt payment of benefit assessments are of the substance and essence of its insurance contracts and a law of the order prescribing a self-executory suspension of the member and forfeiture of his insurance as a penalty for his failure to make prompt payments is reasonable and will be enforced by the courts. [Harvey v. Grand Lodge, 50 Mo. App. 472; Curtin v. Grand Lodge, 65 Mo. App. 297; Lavin v. Grand Lodge, 104 Mo. App. 1; Burke v. Grand Lodge, 136 Mo. App. 450; Woodmen v. Tevis, 117 Fed. Rep. 369; McMahon v. Maccabees, 151 Mo. 522.]

Where the contract, as evidenced by the certificate, constitution and by-laws of the order, does not make the provisions insuring the prompt payment of dues and assessments self-executing, but merely provides that a failure to pay shall constitute a ground for

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suspension and forfeiture, it does not become effective until the forfeiture and suspension are declared by the order and notice of such action given the delinquent member. [Seehorn v. Catholic Knights, 95 Mo. App. 233.] But the parties have a right to stipulate in their contract that a failure of the insured to pay as agreed, of itself, shall terminate the insurance without notice and such we find to be the character of the contract under consideration.

Knod knew, for his contract so told him, that monthly assessments were being levied with clockwork regularity and yet for nine months he failed to make any payments, though he knew that the omission to pay a single assessment would, *ipso facto*, forfeit his certificate. We cannot do otherwise than to hold that he had ceased to be a member in good standing and had forfeited the insurance, unless we should find evidence of a waiver of the suspension and forfeiture by defendant. The waiver claimed by plaintiff consists of the alleged promises and representations of the clerk of the local lodge to Knod that his dues and assessments would be paid by that lodge during his sickness. The laws of the order did not require or authorize subordinate lodges to extend such favors nor did they allow such lodges or their officers to make agreements or promises that would alter or waive any of the general laws, especially those of the essence of defendant's insurance contract. Under a contract of such character it devolved on plaintiff, if she would establish a waiver based on the promises of the clerk to show, as was done in the Burke case (*supra*) that the promises were made in pursuance of a practice of the local lodge, known to, or acquiesced in, by defendant or some of its chief officers, or, in some manner, had the sanction and approval of the general governing body of the order.

"A member dealing with a subordinate officer of the Society knowing his duties to be prescribed

by law, has no right to rely upon the act of that officer, if he should attempt to waive a requirement which, under the law he has no right to waive. But where he has dealings of that kind with such officer and those dealings are of such a nature that they must pass under the observation of those who have in charge the ultimate management of the company's affair to such an extent as to justly induce the member to believe that the practice is approved by the company itself, the company is estopped to take advantage of the situation." [McMahon v. Maccabees, *supra*.]

The record shows nothing more in favor of plaintiff's position than the bare fact that a subordinate officer made promises which her son knew he had no authority to make. A waiver cannot be predicated upon such evidence.

These considerations lead to the conclusion that, since plaintiff's own evidence indisputably shows a forfeiture of the insurance before the death of her son, the judgment is for the right party and should not be disturbed. Accordingly the judgment is affirmed.

All concur.

C. K. BOWEN, doing business as THE KANSAS CITY VIEW COMPANY, Appellant, v. THOMAS B. BUCKNER, Respondent.

Kansas City Court of Appeals, June 2, 1913.

1. **PARTIES TO ACTION: Trade Name: Real Party in Interest.** Where a real party in interest sues, or is sued, in a name by which he is known to the world and such name is the name of a natural or artificial person, the action cannot be treated as a nullity, though such name is not the real name of the party.

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2. _____: Name Adopted: Fraud. In the absence of fraud, a person may do business and execute contracts in any name he or she has chosen to assume and has a perfect right to sue and be sued in such name.
3. _____: Pleading: Misnomer. A civil action can be maintained only against a legal person, but that if the fault of the petition consisted of the misnomer of a legally existing defendant, the plaintiff has a true action, subject only to defendant's right to object at the threshold for misnomer.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

REVERSED AND REMANDED.

E. W. Wright for appellant.

(1) The court erred in sustaining defendant's motion for change of venue. Eudaley v. Railroad, 186 Mo., 403; Guy v. Railroad, 197 Mo. 181; Priddy v. Raice, 201 Mo. (2) The court erred in sustaining defendant's motion to dismiss plaintiff's appeal. Conrad Co. v. Spinks, 38 Mo. App. 309; Machine Co. v. Watson, 43 Mo. App. 338; Parks v. Talman, 113 Mo. App. 17; Express Co. v. Street Railway, 126 Mo. App. 471; Wagner v. Gray, 145 Mo. App. 543; Street Railway v. Express Co., 145 Mo. App. 371; Hose v. Duncan, 50 Mo. 453; Beattie v. Hill, 60 Mo. 72; Fowler & Wild v. Williams, 62 Mo. 403; Davis v. Kline, 76 Mo. 310; Lilly v. Tobbin, 103 Mo. 489; Sheridan v. Nason, 159 Mo. 27.

John I. Williamson and *Thomas B. Buckner* for respondent.

Suits must be brought in the name of the real parties in interest. R. S. 1909, sec. 1724. The suit to be in the name of the real party in interest must be in their true names. Bliss on Code Pleading, Secs. 145, 146, and cases there cited. A civil suit or action

can be commenced only by an actual, legal person existing at the time the suit is brought, and if not so brought it is an absolute nullity void *ab initio* and is incapable of amendment. Street Railway v. Express Co., 145 Mo. App. 371, and cases there cited. When a suit has been attempted to be brought but not by a legal person or not against a legal person, no new person by amendment can be made plaintiff or defendant after the statute of limitations has run. Jaicks v. Sullivan, 128 Mo. 177. The record shows the application for a change of venue was filed after the motion to dismiss had been submitted to the court, the evidence heard on said motion, that "Kansas City View Company" was not a corporation, the whole question argued and briefs submitted and the judge had announced what his decision would be on the motion. Such a motion came too late. Junior v. Electric Power Co., 127 Mo. 79.

JOHNSON, J.—This suit was commenced July 27, 1910, before James H. Richardson, a justice of the peace for Kaw township, Jackson county, Missouri, upon an account. The statement filed by plaintiff was made out on a printed bill head of the "Kansas City View Co." and stated that on August 11, 1905, that concern had made and delivered to defendant certain portraits for the price of \$100. The statement did not disclose whether or not the Kansas City View Company was a corporation, or other artificial entity, but at the top in one corner the name "C. K. Bowen, President," was printed in small type. Summons was issued in the name of the Kansas City View Company as plaintiff and served on defendant who, afterward, appeared before the justice and on September 15, 1910, filed a motion to dismiss the action on the grounds that "plaintiff is not a corporation; that there is no such person as the Kansas City View Co.; that said suit was not brought by the real

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party in interest; and that the Kansas City View Co. has no legal capacity to sue in the courts of this State." The court overruled the motion and allowed the statement to be amended by the substitution as plaintiff of "C. K. Bowen, doing business as Kansas City View Company."

The suit was commenced about two weeks before the account would have been barred by the Statute of Limitations but the amendment was made after that date. Defendant filed an answer in which he attacked the amendment and pleaded the Statute of Limitations. On successive changes of venue taken by the respective parties the suit finally came before M. H. Joyce, another justice of the peace for Kaw township, where it was tried, resulting in a verdict for defendant. Plaintiff appealed to the circuit court and defendant moved to dismiss the appeal on the following grounds:

"1st. Because this suit as appears by the record was originally instituted by the Kansas City View Co. which is not a legal being and is not possessed of the legal capacity to sue or be sued.

"2nd. Because the pretended amendment of the pretended cause of action is and was a nullity because not made as by law required.

"3rd. Because as appears by the record said pretended amendment was attempted to be made after said alleged cause of action was barred by the Statute of Limitations.

"4th. Because said attempted amendment was a nullity for the reason that there was no action pending at the time and nothing to amend by."

This motion was sustained and the appeal dismissed, whereupon plaintiff, in due course of procedure, brought the case here by appeal.

The parties agree that the Kansas City View Company had no corporate existence. It was the trade name under which Bowen was doing business

with the public and the determinative question before us is whether or not an action brought under that name by Bowen, the real party in interest, was a nullity because of a lack of legal entity in the party named as plaintiff, or, at most, was a mere misnomer of the real party in interest and, therefore, a defect that might be cured by amendment. If a mere misnomer the amendment did not change the cause nor inject a new party into the action and in that view the issue of limitation would drop out of the case since the action was instituted before the account would have become barred had no suit been brought upon it.

The courts of this State have held repeatedly that "amendments are allowed expressly to save the cause from the Statute of Limitations and courts have been liberal in allowing them when the cause of action is not totally different." [Lottman v. Barnett, 62 Mo. l. c. 170; Lilly v. Tobbein, 103 Mo. l. c. 490; Courtney v. Blackwell, 150 Mo. l. c. 271; Cytron v. Transit Co., 205 Mo. l. c. 700.]

In *House v. Duncan*, 50 Mo. 453, the plaintiffs sued in their partnership name in a justice court and the action was dismissed in the circuit court notwithstanding plaintiff's offer to amend. The Supreme Court held:

"We think the decision of the court was wrong. Amendments are favored and should be liberally made in furtherance of justice. When a cause is appealed from a justice of the peace to the circuit court, it is tried upon its merits, and the only prohibition against making amendments is that the cause of action shall not be changed. [Wagn. Stat. 850, sec. 19.] Now the rectifying the mistake in the name of a party, or bringing in a new party, in nowise changed the cause of action."

A similar case was before the court in *Beattie v. Hill*, 60 Mo. 72, where it is said, "No new or different

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cause of action was proposed to be introduced. The controversy remained the same as it was originally, and the parties were the same, the only difference being that the statement cured a defect in the description of the parties."

And in another case of the same nature, Fowler v. Williams, 62 Mo. l. c. 404, it is said, "Where the declaration is in the name of a firm, if advantage is sought to be taken of the defect, it should be done by a suitable motion before the trial is closed, so as to give the parties an opportunity to amend. If no such motion is made and the case proceeds to judgment, the judgment will not be void but will be good after verdict."

To the same effect are the cases of Davis v. Kline, 76 Mo. 310; Lilly v. Tobbein, *supra*; Conrades v. Spink, 38 Mo. App. 309; Williams v. Kitchen, 43 Mo. App. 338.

In Sheridan v. Nation, 159 Mo. 27, the plaintiff, who had twice married, sued in her former name which she had resumed and had become known by. The court held that the action could be prosecuted in that name, saying, in part: "The statute requiring actions to be brought in the name of the real party in interest, is no prohibition against suits being brought in a name other than that by which one has been christened and has received from his or her parents, or that of the husband, where the party suing is a married woman. It was the real party in interest as he or she is known in the business world, and in courts where business differences are adjusted and settled, that the authors of the statute had in mind, when section 540, Revised Statutes 1869, was enacted, with little thought of the question as to the particular name by which the litigant might have been designated in the birth records of the family or the marriage record of the church or county. It is the individual identified that the law desires, not a record appella-

tion, by which one was known in former years, established. It is entirely settled, both by the elementary writers and adjudicated cases, that in the absence of fraud, a person may do business and execute contracts in any name he or she has chosen to assume and has a perfect right to sue and be sued in such name."

We had before us in *Parks v. Tolman*, 113 Mo. App. 14, a case where a married woman who was known by her marital name brought suit in her maiden name. We held that the action could not be maintained in that name. Speaking through ELLISON, J., we said: "It is quite true that a person may take up some other than his real name and become known to the world by the adopted name and by that he may sue and be sued. And so one may use a name not real and in many instances be bound by estoppel. . . . But in point of fact, without regard to the statute, the law does now, and has always, required that a party in using a name as a party to a suit should use the name of the person intended to be designated, whether that be real or adopted. The law, with or without the statute, never intended that a person, in the absence of adoption or estoppel, might take up any name at random, and make use of it to sue another."

In *Railroad Co. v. Express Co.*, 145 Mo. App. 371, a defendant that had no legal entity was sued. We held that a civil action can be maintained only against a legal person but that if the fault of the petition consisted of the misnomer of a legally existing defendant, we would hold that the plaintiff had a true action, subject only to defendant's right to object at the threshold for misnomer.

The cases we have reviewed are found, on analysis, to be harmonious and from them the rule may be deduced that where a real party in interest sues or is sued in a name by which he is known to the world and such name is the name of a natural or artificial

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person, the action cannot be treated as a nullity, though such name is not the real name of the party. Of course a person or persons sued in such manner who are not served with summons or do not appear in the case would not be bound by the proceedings, and as to them, the action would fail. [Railroad Company v. Exp. Company, *supra*.] But where the real party is designated by a name he has adopted and become known by, and is brought into court, no reason can be perceived for dismissing the action on the ground of the lack of a legal plaintiff or defendant.

Bowen had been doing business with the public in the name of a corporation that had no legal existence. But in holding himself out to the world as the president and manager of a nonexistent corporation he became responsible personally for all of the acts he performed or the contracts he made in his trade name and would be estopped from repudiating them. If a judgment were recovered against the *pseudo* corporation, he would not be heard to resist the execution on the ground that there was no such corporation and his property would be subject to the levy. We think there was a misnomer of the real party in interest, but since the misnomer was descriptive of the real plaintiff, was the name under which he was doing business with the public and by which he might be sued, we hold there was no lack of a legal entity before the court and that the amendment allowed by the justice was proper.

The case of Railroad v. Dalton Marble Works, 122 Ga. 774, 50 S. E. 978, differs from the case in hand since the name Dalton Marble Works was not the name of a natural or artificial person nor of a partnership. The same may be said of the cases of Steamboat v. Wilson, 11 Ia. 479, and Estate of Columbus v. Monti, 6 Minn. 403. In each of those cases there was an apparent lack of legal personality in the claimant (30 Cyc. p. 28), while here there was not

only an apparent legal personality but a true designation of the real plaintiff. In view of what has been said in the cases decided in this State, especially in *Sheridan v. Nation*, *supra*, we think the spirit, if not the letter of our statutes relating to amendments in justice courts would be violated should we hold the amendment to have been improperly allowed.

The judgment is reversed and the cause remanded. All concur.

HENLEY-WAITE MUSIC COMPANY, Respondent,
v. CHARLES E. GRANNIS, Appellant.

Kansas City Court of Appeals, June 2, 1913.

1. **CONTRACTS: Sales: Upon Approval.** Where a piano was delivered on the express understanding and agreement that it would turn out to be satisfactory to the purchaser and the latter notified the seller within a reasonable time after its delivery that it was not satisfactory, there was no sale.
2. _____: _____: **Status Quo.** And where the contract of sale imposed no obligation on the purchaser to return the piano, it was the duty of the seller to restore the *status quo* existing at the time the contract was made.
3. **MISCONDUCT OF COUNSEL: Prejudicial Remarks.** Remarks of counsel alleged to be prejudicial addressed to issues improperly submitted at the request of the opposing party, could not have been prejudicial and afford no ground for setting aside a verdict.

Appeal from Jackson Circuit Court.—*Hon. Porter B. Godard*, Special Judge.

REVERSED AND REMANDED (*with directions*).

Haff, Meservey, German & Michaels and *Charles M. Blackmar* for appellant.

(1) Plaintiff's own case showed that plaintiff agreed or guaranteed that the instrument should be

entirely satisfactory to defendant, and that within a few days defendant notified plaintiff that it was not satisfactory; defendant testified to the same thing. Therefore the court should at the close of plaintiff's evidence, or, at all events, at the close of the case, have directed a verdict for defendant on plaintiff's petition. Prevention Co. v. St. Louis, 205 Mo. 239; 35 Cyc. 289; Mecham on Sales, (1901 Ed. Secs. 663, 664, 665, 666, 670; Blaine v. Knapp & Co., 140 Mo. 251, and cases cited; Esterly v. Campbell, 44 Mo. App. 621; Walker v. Automobile Co., 124 Mo. App. 628; McClure v. Briggs, 68 Vermont 82, 57 Am. Rep. 715; Printing Press Co. v. Thorp, 36 Fed. 414, 1 L. R. A. 645; McCormick v. Finch, 100 Mo. App. 646. (2) Defendant's first counterclaim was also established by plaintiff's witnesses, and the trial court should likewise have directed the identical verdict on this counterclaim that was returned by the jury. (3) Defendant's counsel were not guilty of misconduct. McCoe v. Railroad, 53 N. E. (Mass.) 133; Handlan v. Miller, 143 Mo. App. 113; George v. Railroad, 57 Mo. App. (K. C.) 365; Peck v. Traction Co., 131 Mo. App. 143; Storage & Moving Co. v. Harding, 126 Mo. App. 494; Rice v. Sally, 176 Mo. 148; Cullar v. Railroad, 84 Mo. App. 346; Schlavick v. Shoe Co., 157 Mo. App. 91; Hensler v. Gordon, 152 Mo. App. 500-502; Phillips v. Chase, 87 N. E. (Mass.) 758.

No counsel for respondent.

JOHNSON, J.—Plaintiff sued to recover \$550 on the purchase price of an "Appollo" player piano which the petition alleges was sold and delivered by plaintiff to defendant at the price of \$950. A credit of \$400 was allowed on account of an old piano and pianola which plaintiff states it agreed to take from defendant in part payment. The sale is denied in the answer and in a counterclaim defendant seeks to

recover damages for the alleged conversion by plaintiff of the old piano and piano player. A trial of the issues resulted in a verdict for defendant on the cause pleaded in the petition and on the counterclaim in the sum of \$160. Afterward the court sustained plaintiff's motion for a new trial on the ground of improper and prejudicial remarks of counsel for defendant both in the opening statement and in the final argument to the jury. Defendant appealed from the order and judgment granting a new trial.

Before the submission of the cause in this court, counsel for plaintiff formally withdrew from the case and no statement and brief have been filed on behalf of plaintiff.

Our examination of the record has lead us to the conclusion that the court erred in granting a new trial. Plaintiff, a dealer in musical instruments in Kansas City, endeavored to sell an "Appollo" player piano to defendant at the price of \$950, and offered to allow defendant \$400 for his old piano and pianola. Defendant agreed to buy on the terms proposed on condition that after a test of the new instrument it would prove satisfactory to him. Plaintiff delivered the instrument to defendant's home on those terms and took away the old instruments. Defendant, with in a reasonable time, notified that the new piano was not satisfactory and demanded that plaintiff take it away and return the old instruments but plaintiff refused to comply with the demand and brought this suit. The salesman of plaintiff who conducted the negotiations testified on direct examination that the sale was unconditional and not on approval, but on cross-examination admitted that he agreed and represented that the piano should prove satisfactory to defendant. All of the evidence shows an agreement for a sale on approval within a reasonable time and a disapproval within that time.

A sale on approval "is in the nature of an option to purchase the goods if they prove to be satisfactory," (35 Cyc. 289) and if the goods prove to be unsatisfactory to the purchaser and he gives notice of that fact to the seller within the time stated in the agreement, or if none be stated, within a reasonable time, there is no sale and the purchaser is under no duty to return or offer to return the property unless it be so agreed. [Esterly v. Campbell, 44 Mo. App. l. c. 625.] The law recognizes the right of vendor and vendee to make their own contracts and where the vendor agrees that the sale shall be conditioned on the goods being tested and approved by the vendee, it suffices to defeat the sale that the vendee, for any reason, or no good reason, rejects the goods as unsatisfactory. The contract being that he shall be satisfied "it is not enough that he ought to be satisfied, or that the article would be satisfactory to a reasonable man, or that the court or jury deem the article satisfactory." [1 Mecham on Sales, sec 665.]

To hold otherwise would be to substitute a court made contract for the one the parties made for themselves. Since the new piano was delivered on the express understanding and agreement that it would turn out to be satisfactory to defendant, and since within a reasonable time after its delivery defendant notified plaintiff that it was not satisfactory, there was no sale, and as the contract imposed no obligation on defendant to return the piano, it was the duty of plaintiff to restore the *status quo* existing at the time of the contract. In refusing to discharge this duty plaintiff was guilty of a conversion of defendant's old piano. There was no issue of fact to submit to the jury except the amount of the damages defendant should have assessed on his counterclaim and as the alleged prejudicial remarks of counsel for defendant were addressed to other issues of fact improperly

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submitted at the request of plaintiff, the alleged error predicated of them could not have been prejudicial and afforded no good ground for setting aside the verdict.

The judgment is reversed and the cause remanded with directions to enter judgment on the verdict. All concur.

WILLIS SURSA, Respondent, v. C. N. CASH, Appellant.

Springfield Court of Appeals, May 5, 1913.

1. **JUDGMENT: Dismissal Without Prejudice: Not a Bar to Further Action.** A judgment which shows that plaintiff's petition was dismissed "without prejudice" does not bar another suit on the same cause of action.
2. **STATUTE OF FRAUDS: Contracts Within: Exchange of Real and Personal Property.** An oral contract sought to effect an exchange of property, both real and personal. *Held*, to be within the Statute of Frauds.
3. **—: Remedy at Law, Invoked: Part Performance Not Applicable.** When the remedy sought is at law, the doctrine of part performance of a contract does not place it outside of the operation of the Statute of Frauds.
4. **—: Exchange of Land: Oral Contract.** In a contract for the exchange of land, where it is necessary that each party to the contract be bound in writing, a part performance of the contract on one side cannot be made the foundation of a suit at law for damages against the other party for a breach of an oral agreement.
5. **SPECIFIC PERFORMANCE: Oral Contract: Theory of Decree.** A court of equity decrees specific performance in cases where an oral contract is partly performed, *not* on the theory of enforcing the oral contract. But the decree requires the defendant to do certain things, because his promises have caused the other party to change his position, and to do otherwise would permit the Statute of Frauds to be used as a cloak for fraud.

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6. **STATUTE OF FAUDS: Contract Partly Within: Statute Applicable to Entire Contract.** Where part of a contract, which must be taken as an entirety, is within the Statute of Frauds, the whole contract must be governed by the statute.
7. _____: **Oral Contract: Part Performance: Requisites.** The performance of a contract, which is merely auxiliary to the one sought to be enforced, is not sufficient part performance to take a parol contract out of the Statute of Frauds.
8. _____: **Memorandum of Contract for Sale of Land: Deed in Escrow or Undelivered.** An undelivered deed, or a deed delivered in escrow, is not a sufficient memorandum of a contract of sale of land to take it out of the Statute of Frauds.
9. _____: _____: **Estoppel in Puis: Contract Non-enforceable.** There being no evidence that defendant induced the plaintiff to make the oral contract for the exchange of property with a fraudulent intent not to carry it out, the principal of estoppel *in pais* could not be invoked against the defendant, because the very contract which he is charged with having failed to perform is nonenforceable under the statute.

Appeal from Ripley County Circuit Court.—*Hon. J. C. Sheppard, Judge.*

REVERSED AND REMANDED (*with directions*).

Thos. F. Lane and Chas. B. Butler for appellant.

(1) Respondent having declared upon an oral contract for the exchange of land for land and merchandise of the value of thirty dollars or more, the contract must be shown to be fully executed or it is within the Statute of Frauds. R. S. 1909, sec. 2783; R. S. 1909, sec. 2784; Beckmann v. Mephan 97 Mo. App. 161; 147 Mo. App. 85; 141 Mo. App. 421; Lydick v. Holland, 83 Mo. 703. (2) Vendor cannot enforce specific performance nor recover damage for the breach of an oral contract for the sale of land although he has delivered possession to vendee and received part of the purchase price. Luckett v. Williams, 37 Mo. 397; Emmel v. Hayes, 102 Mo. 186. (3) Where a court of equity acquires jurisdiction it will proceed

to complete justice between the parties even to the awarding of damages. Plaintiff cannot recover damages in another action after his bill in equity is dismissed. Lydick v. Holland, 83 Mo. 703; Devore v. Devore, 138 Mo. 181. (4) Where specific performance of an oral contract will not be enforced because within the Statute of Frauds damages will not be allowed for its breach. Lydick v. Holland, 83 Mo. 703; Devore v. Devore, 138 Mo. 181; 20 Cyc. 2. (5) The Statute of Frauds is available as a defense without being specially pleaded in any case where the pleading denies the contract set up. The answer in this case does deny the contract set up. Devore v. Devore, 138 Mo. 181; Hackett v. Watts, 138 Mo. 502; Boyd v. Paul, 125 Mo. 9. (6) The Statute of Frauds may be raised as was done in this case by calling the attention of the court directly thereto by objection to the introduction of the evidence. Allen v. Richard, 83 Mo. 55; Hurt v. Ford, 142 Mo. 283.

No brief filed for respondent.

STATEMENT.—The controversy in this appeal grew out of an unsuccessful attempt by plaintiff and defendant to exchange property. The defendant in the circuit court is appellant here.

The amended petition alleged that respondent had entered into an oral contract with appellant to exchange his farm for a house and lot in the town of Naylor together with a stock of goods in said house; that the agreed price of the house and lot was eight hundred dollars; the stock of goods was to be invoiced at the first cost to appellant; that in consideration thereof respondent was to convey to appellant his farm in Ripley county at the price of three thousand dollars less an incumbrance of four hundred dollars, and sell his personal property on the farm and after paying the proceeds of the sale to appellant

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either in money or notes payable to appellant to execute a mortgage on the house and lot for the balance, to be due in nine months from the taking of said invoice. That in pursuance thereof respondent and appellant executed deeds to their respective parcels of real estate, and placed them in the Bank of Naylor, together with the abstract of title to respondent's farm, to be delivered when the invoice of appellant's stock of merchandise had been taken. That respondent sold his personal property at auction as agreed upon, tendered appellant the proceeds thereof, delivered the possession of the farm to appellant, and offered to take the invoice of appellant's stock of merchandise and execute the mortgage for the balance, if any, and requested the delivery from defendant of the warranty deed conveying the lot and store building and requested the possession of the stock of goods at the invoice price according to the terms of said agreement; that appellant refused to comply with the terms of the contract; and that he was damaged in the aggregate six hundred dollars, setting forth the several items of damage.

Appellant filed a demurrer to the amended petition setting out that the petition did not state a cause of action and that the contract pleaded was within the Statute of Frauds, which was overruled.

Thereupon the appellant filed an answer containing (1) a general denial, (2) a plea that the contract relied upon by respondent was within the Statute of Frauds, not being in writing, and (3) the defense that respondent was barred from prosecuting his action by reason of a judgment in equity against him whereby he sought to enforce specific performance of the same contract. And before the introduction of any evidence in the cause appellant made formal objection to the taking of any testimony, stating the same grounds as were alleged in the demurrer. The defendant requested and the court refused to give a

peremptory instruction at the close of the plaintiff's evidence and again at the close of all the evidence in the case. The jury returned a verdict for the plaintiff for the sum of two hundred dollars.

There is no dispute between the parties that there was an oral agreement concerning an exchange of the plaintiff's farm for the defendant's store building and lot and a stock of goods which was worth approximately three thousand dollars. There is a direct conflict in the evidence as to whether plaintiff delivered possession of the farm to defendant. Plaintiff's testimony is that they made the trade; that he was to sell his personal property at auction and that he was to deliver the proceeds to defendant in cash, or sale notes made payable to defendant; that they were then to take an invoice of defendant's stock of goods, and if there was a balance due the defendant, plaintiff was to give defendant a note secured by a mortgage on the store building. Plaintiff says he delivered possession of the farm to defendant the day the trade was made, and that defendant thereupon orally rented the farm to one Smith, and Smith testified that defendant told him the trade was made and that he was able to rent him the farm. Plaintiff testified that he surrendered possession to the defendant, and that it was agreed that he was to let Smith have the place immediately after the sale of the personal property at auction. Smith admitted that he never paid any rent to either defendant or plaintiff.

Davis, the bank cashier, testified that defendant made a signed application to him for a loan on the Sursa farm and signed a sworn affidavit that he owned it.

Defendant testified that the trade was not consummated; that he did go and look at plaintiff's farm and agreed to go ahead and make the deeds the next day; that he told plaintiff he would make the trade if everything was all right, and that they did make

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the deeds and put them in escrow in the bank to be held until the deal was closed; that subsequently, after the deeds had been made, and, with plaintiff's abstract, deposited in escrow, but before plaintiff had his auction sale and before the day set for beginning the invoice of defendant's stock of goods, he (the defendant) discovered through the bank's attorney (who later became his attorney) that there were some flaws in the title to plaintiff's farm, and that he then went several miles into the country and notified the plaintiff that he would not trade and for plaintiff to call off his sale of the personal property, but that plaintiff said he was going ahead anyhow; that plaintiff never delivered any cash or notes to him, and that he never delivered possession of the lot and store building and stock of goods to plaintiff.

Plaintiff's version is that defendant came to him and said his (defendant's) deed was not good, and that defendant never said anything about the plaintiff's abstract not showing good title, and that defendant did not tell him to call off the auction sale; that he had such sale and deposited the proceeds in the bank—three hundred dollars in cash and about ninety dollars in sale notes made payable to the defendant—and that he then offered to take the invoice of defendant's stock of goods, but that defendant's attorney who was in the store at the time refused to go ahead, saying they were not going to trade—that his (plaintiff's) deed was "no account;" that he replied that if it was not good he would try and make it good, but that the attorney said they were not going to trade anyhow. Plaintiff testified that after his auction sale Smith came on the place. The evidence shows that plaintiff subsequently sold the farm to a man named Roberts.

A notary named Sands prepared the deeds for plaintiff and defendant and took their acknowledg-

ments, and he testified for plaintiff that he heard the parties discussing the contract at the time, and, continuing—"Mr. Cash and Mr. Sursa wanted me to write out a contract between them in regard to the transaction and Mr. Sursa was wanting to get off on the train and I would have to write it in a hurry; and I told him that I would not have time to write up a contract like they wanted by the time the train came. . . . They said they didn't have time." Consequently the contract was not reduced to writing. Sands further testified that plaintiff and defendant each took his deed and went down and deposited them with the cashier of the bank "and told him to hold them until the contract was finished or until the invoice was taken, so they would know what to do with them." He also testified that he was present at the time they were deposited and that some conversation was had by plaintiff and defendant concerning plaintiff's title and abstract and that plaintiff left the abstract there at the bank with the understanding that defendant could have an attorney examine it and that if the title was not good he would make it good.

Defendant introduced in evidence a petition and judgment in a cause wherein plaintiff Sursa sought to obtain specific performance of defendant's contract which action had theretofore been pending in the same court.

OPINION.

FARRINGTON, J. (after stating the facts).—As a preliminary consideration, appellant contends that his peremptory instruction should have been given for the reason that plaintiff had theretofore brought a suit for the specific performance of this contract and that a decree was rendered in favor of the defendant in which the court refused to enforce the performance of the contract and made no allow-

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ance of damages; and appellant argues that the question of damages was before the court in that case and was adjudicated. The judgment in that case shows on its face that plaintiff's petition was dismissed "without prejudice." Hence there is no merit in appellant's argument. [Long v. Long, 141 Mo. l. c. 370, 371, 44 S. W. 341.]

Appellant's principal contention is as follows: "Respondent, having declared upon an oral contract for the exchange of land for land and merchandise of the value of thirty dollars or more, the contract must be shown to be fully executed or it is within the Statute of Frauds."

It will be observed that this oral contract sought to effect an *exchange* of property, both real and personal. Such contracts are within the Statute of Frauds in this State. [Beckmann v. Mepham, 97 Mo. App. 161, 70 S. W. 1094; 20 Cyc. 239; Hackett v. Watts, 138 Mo. 502, 40 S. W. 113; Chambers v. Le-compte, 9 Mo. 575; Purcell v. Coleman, 18 L. Ed. (U. S.) 435; Rice v. Peet, 15 Johns. 503.]

One of the essential elements which the jury were told in the instructions they must find in order to return a verdict for the plaintiff was that plaintiff had performed all the conditions of the contract on his part to be performed, and their finding was for the plaintiff. Therefore, in deciding whether the contract was within the Statute of Frauds, we must take it as conceded that plaintiff delivered possession of the farm to Smith, the tenant, after the sale and loss on plaintiff's personal property under the oral contract, such concession not being made, however, as to the delivery of the deed. Such part performance did not take the contract out of the Statute of Frauds. [Adams v. Townsend, 42 Mass. 483.] Indeed, the courts of this State have held that the doctrine of part performance of a contract does not take it out of the operation of the Statute of Frauds when

the remedy sought is at law. [Johnson v. Reading, 36 Mo. App. 306; Nally v. Reading, 107 Mo. 350, 355, 17 S. W. 978; Marks v. Davis, 72 Mo. App. l. c. 652; Smith v. Davis, 90 Mo. App. l. c. 538; Chenoweth v. Pacific Express Co., 93 Mo. App. l. c. 191; Ver Steeg v. Longo Fruit Co., 158 Mo. App. l. c. 129, 138 S. W. 901.] Besides, the theory on which a court of equity decrees specific performance in cases where the oral contract is partly performed, is not on the theory of enforcing the oral contract; the decree requires the defendant to do certain things where he has led the other party to change his position and where to do otherwise would permit the Statute of Frauds to be used as a cloak for fraud and be unconscionable. [Bingham on Sale of Real Property, Chap. VI.] We therefore hold that in a contract for the exchange of land, where it is necessary that each party to the contract be bound in writing, a part performance of the contract on one side cannot be made the foundation of a suit at law for damages against the other party for a breach of an oral agreement. To hold otherwise would necessarily require that the defendant be held to pay damages for not doing that thing which the Statute of Frauds says, in effect, he cannot be made to do unless he has bound himself by a writing. [Chambers v. Lecompte and Hackett v. Watts, supra.]

In the cases which we have examined where the courts have decreed specific performance of oral contracts for an exchange on account of part performance (School District v. Holt, 226 Mo. 406, 126 S. W. 462; Brown v. Bailey, 28 Atl. 245; Reynolds v. Hewett, 27 Pa. St. 176; Moss v. Culver, 64 Pa. St. 414) the facts disclosed that the exchange and possession given thereunder was given and accepted by both parties, and these cases can be clearly distinguished from the case before us, *first*, because, of course, that is an action at law and the doctrine of part performance

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does not apply; *second*, because the plaintiff in this case had partly performed by giving possession of his farm but the defendant had wholly failed to do anything under the contract as to his property that would in any way change his title or possession; *third*, because the damages claimed are not for property which passed from the plaintiff to the defendant and is now being held by the defendant; and *fourth*, because the damages, such as were shown, were incurred before the part performance on the plaintiff's side is alleged to have taken place.

It is undisputed that defendant never delivered his deed nor possession of his stock of goods and store building, but refused to go ahead with the deal.

The evidence shows that plaintiff had the auction sale of his personal property in accordance with the oral contract and tendered the proceeds to the defendant which was not accepted, and afterward sold the farm to another, and at the time this suit was instituted defendant had nothing in his possession or under his control that passed to him from the plaintiff by virtue of the oral contract. The plaintiff seeks to charge him with the loss on the sale of the personal property on the farm and the expense of moving off when Smith took possession.

It is stated in Lydick v. Holland, 83 Mo. 703, 707; "The law is well settled that the performance of a contract, which is preparatory and ancillary to the one sought to be enforced, is not sufficient part performance to take a parol contract out of the Statute of Frauds. [Williams v. Morris, 95 U. S. 444.]" In that case it is shown that the plaintiff, owning a certain tract of land, would not sell it unless he could buy a tract owned by the defendant; that defendant agreed to sell him his land for a stated price, and that relying on that agreement plaintiff sold his tract of land. After this was done, defendant repudiated the agreement and refused to make a deed to plain-

tiff. The court held that the sale of plaintiff's land to a party other than the defendant was not a sufficient part performance to affect the contract. The plaintiff was seeking both specific performance and damages for breach of the contract, and the last sentence of the opinion reads as follows: "The ground upon which he fails to have a specific performance is equally fatal to his demand for damages." In that case the plaintiff had sold land preparatory to buying defendant's land. In this case the plaintiff sold some horses and other personal property preparatory to buying defendant's land.

The recent case of *Boone v. Coe*, 154 S. W. 900, decided by the Court of Appeals of Kentucky, lays down the rule, citing numerous authorities in support, that if one party receives services, or benefits, or property, from another who is performing a verbal contract, which is within the Statute of Frauds, the latter may recover at law upon the *quantum meruit* as the law implies a promise to pay; but that where one party is merely put to a loss by virtue of his performance of a verbal agreement within the statute, and the other party has received no benefit thereunder, the party sustaining the loss cannot recover, the reason being that the law implies a promise to pay for something of value received from another, but the Statute of Frauds does not imply that one of the parties to a contract which falls within it shall pay for the loss or damage occasioned by the other's performance where he receives nothing under the contract.

This case does not fall within the rule laid down in *Maupin v. Railway Co.*, 171 Mo. l. c. 196, 71 S. W. 334; *Cape Girardeau & C. R. Co. v. Wingerter*, 124 Mo. App. 426, 101 S. W. 1113; *Mitchell v. Branham*, 104 Mo. App. 480, 79 S. W. 739, and numerous other cases in this State, which hold that an oral contract which has been fully performed is taken out of the

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statute, as the facts of this case disclose that the defendant has nothing which he acquired by reason of the oral contract that a court would require him to pay for. This cause of action was not brought before the court for the purpose of seeking to require defendant to pay for property which he received from the plaintiff, nor for the value of anything passing from the plaintiff to the defendant, but is based on the failure to carry out the provisions of the oral contract. As the party sought to be charged had signed no writing, and had done no act with reference to his lot and store building and stock of goods that would take the place of a writing, i. e. complete performance, and as his real and personal property was to be exchanged for plaintiff's real estate, it was an entire contract, one in which the items could not be separated, and plaintiff held nothing in the way of a writing that would give him a right to sue for damages in an action at law on a contract which the Statute of Frauds says must be evidenced by a writing signed by the party to be charged. [Chambers v. Lecompte, *supra*; Andrews v. Broughton, 78 Mo. App. 179; Beckmann v. Mephan, *supra*; 20 Cyc. 285.] Conceding that delivery of the possession of the farm and offering to deliver a deed therefor would take the transaction out of Statute of Frauds as to that branch of the contract, this certainly would not take the entire contract out of the statute because in order to hold the defendant to perform or answer in damages for breach of the contract there must have been something in writing or a complete performance on the part of the defendant that would take that which he was to do outside the statute. The very nature of this contract required, in order to bind both parties to a performance or to answer in damages, that the properties that the contract sought to effect an exchange of, be in writing, as a part of the consideration on each side was land and goods of the value of more

than thirty dollars, and where a part of an entire contract is within the statute, the whole contract must be governed by the statute. [Home Insurance Co. v. Bloomfield, 141 Mo. App. 417, 125 S. W. 1193.] Both properties contracted for required a writing signed by each party to be charged and the contract is indivisible and therefore unenforceable. [Andrews v. Broughton, *supra*.] It presents a different case from one where a party agrees to buy a farm for a certain sum of money, because the promise to pay the certain sum of money is not within the Statute of Frauds; but the consideration moving from the defendant to the plaintiff in this case must, in order to be binding on the defendant, be evidenced by a writing signed by the defendant, or a delivery by him of his property, neither of which appears.

The testimony of Sands, the notary, was that the deeds were left at the bank to be kept until the deal was closed. The general rule of law is that an undelivered deed is not a sufficient memorandum of a contract of sale of land to take the same out of the Statute of Frauds, and this doctrine applies to deeds delivered in escrow. [20 Cyc. 257; Townsend v. Hawkins, 45 Mo. 286.]

The oral evidence in this case shows that deeds of some kind were made by the respective parties and placed in the bank in escrow. These deeds were not put in evidence and the contents of the same are not shown. Even though a deed deposited in escrow were a sufficient memorandum of a sale to take it out of the operation of the Statute of Frauds, it is not shown that these deeds, considered as memoranda of the sale, contain a description of the land, the names of the parties, the purchase price, and other elements necessary to constitute a sufficient memorandum. [Moseley v. Insurance Co., 109 Mo. App. 464, 84 S. W. 1000.]

In 20 Cyc. at page 284, it is stated that "the primary effect of the Statute of Frauds is to prohibit

an action for the breach of an oral contract falling within its terms. An action cannot therefore be maintained on an oral contract to sell land against either the vendor or the purchaser."

It will be noted that while plaintiff's petition alleged that defendant took possession of the farm on the day the oral contract was made, and rented it to Smith by parol, there is no evidence that defendant himself ever took actual possession of the farm, nor did Smith, the alleged tenant, move upon the farm until after the alleged sacrifice had been made and the expense incurred on the sale of plaintiff's personal property, which, under the evidence, is the substantial loss shown. There having been no actual possession taken by the defendant, and the deed being undelivered, defendant could not be charged with either actual or constructive possession prior to the time the loss was sustained.

Neither do the facts alleged in the petition nor those shown by the evidence take this case out of the operation of the Statute of Frauds on the theory of equitable estoppel—in that although defendant was not bound by any writing to perform his part of the oral agreement, yet he stood by and saw the plaintiff sell his property at a sacrifice and go to expense in moving off the farm. There is no allegation or proof that defendant in the beginning induced the plaintiff to make the oral agreement with a fraudulent intent of not carrying it out, and in the absence of this element the principle of estoppel *in pais* could not be invoked against the defendant because the very contract which he is charged with having failed to perform is nonenforceable under the statute. [Kirk v. Middlebrook, 201 Mo. l. c. 289, 100 S. W. 450.] It has been held that a promise within the Statute of Frauds cannot be made binding by way of estoppel, though acted upon. [Nichols v. Bank, 55 Mo. App. 81; Smith v. Smith Bros., 62 Mo. App. l. c. 601, 602; Wood v.

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Kansas City, 162 Mo. 303, 311, 62 S. W. 433; 2 Herman on Estoppel, 922; 11 Am. and Eng. Ency. Law, 423, 424; Durkee v. People, 46 Am. St. Rep. 340; Brightman v. Hicks, 108 Mass. 246.]

We have with extreme caution examined the voluminous record in this case and have been at a disadvantage in not having been favored with a brief showing respondent's view of the case. Issues should be sharply drawn in appellate practice, and in this day of public criticism of courts for delay, we do not look with favor upon a practice which requires us to brief one side of a case before proceeding to pass upon the errors complained of. Counsel in all cases are urged to pursue the *regular* way of trying their appeals.

For the reasons herein appearing, the judgment is reversed and the cause remanded with directions to the circuit court to set aside its judgment herein and enter a judgment for the defendant. *Sturgis, J.*, concurs. *Robertson, P. J.*, dissents.

CLAUDE COMSTOCK, Appellant, v. TEGARDEN
PACKING COMPANY, Respondent.

Springfield Court of Appeals, May 5, 1913.

1. **APPEAL: From Justice Courts: Filing Notice of.** While Sec. 7582, R. S. 1909, relating to appeals from justice of the peace courts, does not require that the notice of appeal and proof of service thereof be filed with the trial court, yet the usual and proper practice is to do this so as to avoid controversies relative thereto.
2. _____: _____: **Notice Insufficient: Issues.** When a notice to affirm a judgment for failure to give proper and timely notice of the appeal has been filed, an issue of fact is raised and the court may hear evidence thereon.
3. _____: _____: **Sufficiency of Notice: Jurisdiction.** Section 7584, R. S. 1909, provides for the giving of proper and timely

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notice of an appeal from the justice court, where the appeal is not allowed on the same day the judgment is rendered by the justice. *Held*, that this is a matter going to the jurisdiction of the circuit court to hear and determine the case or to do anything other than affirm the judgment or dismiss the appeal at the option of the appellee.

4. _____: _____: **Necessity of Notice: Actual Knowledge Does Not Relieve From.** Actual knowledge that the appeal has been taken and the case lodged in circuit court and that the same has been docketed and is for trial, does not dispense with the giving and service of a proper and timely notice of appeal.
5. _____: _____: **Notice: Form and Manner of Service: Statutory Requirements.** When a statute prescribes a particular form and manner for the service of a notice, no other form or manner is effectual for any purpose of the notice, without an acceptance or waiver by the party entitled to receive it.
6. _____: _____: **Notice: Service: Requirements of Statutes: Review of.** Sec. 7582, R. S. 1909, providing for a notice of appeal from justices of the peace courts and the manner of serving same, is examined and the essentials of proper notice and service thereof are reviewed and explained.
7. _____: _____: **No Notice Shown: Circuit Court's Duty.** On an appeal from a justice of the peace court to the circuit court, where the appellee has not waived the question of jurisdiction over his person by appearing in the circuit court to the cause generally, the circuit court must affirm the judgment of the justice of the peace or dismiss the appeal, in the absence of an affirmative showing that a proper and timely notice of appeal has been served, and this even though the appellee files no motion to that effect.
8. _____: _____: **Notice: Service on Agent or Attorney: Construction of Provision.** The statutory provision, "if the appellee shall have appeared to the suit before the justice of the peace either by agent or attorney, said notice may be served on said agent or attorney," does not mean that the attorney for the appellee should actually be present in the justice court at the time the judgment is rendered; it is sufficient if the facts show that the attorney, though not actually present, was in fact representing the appellee in the justice court.
9. _____: _____: **Notice: Sufficiency Questioned: Burden of Proof.** Where the sufficiency of the notice of an appeal from justice court is challenged in circuit court, it is incumbent on the one whose duty it was to serve such notice to prove that timely notice in proper form was served and that it contained the requirements made essential by statute.

Appeal from Green County Circuit Court.—*Hon. Guy D. Kirby*, Judge.

REVERSED AND REMANDED.

Hamlin & Seawell, for appellant.

(1) The notice must be in writing specifying the judgment appealed from, may be served on the agent or attorney of appellee, if he appears to the suit before the justice. . . . and, if he did not then it must be served on the appellee R. S. 1909, sec. 7582. (2) The doctrine is abundantly established, that, where a mode of securing jurisdiction differing from that of the common law is prescribed by statute, nothing less than a rigid and exact compliance with the statute is an indispensable requisite to obtaining jurisdiction. *Harness v. Cravens*, 126 Mo. 233, and cases cited. (3) Wherever service is had or notice given with the view of subsequent adjudication, such service or notice must comply with statutory requirements in order to possess any legal efficacy. *Wilson v. Railroad*, 108 Mo. 596, cases cited; *Brown on Jurisdiction*, sec. 41. (4) Appellee may have actual knowledge of an appeal being taken. He may stand by and see it perfected, yet he must have the statutory notice, and this notice describe the cause in which the appeal is taken. If the appellee's knowledge of the appeal does not affect the matter, it would seem that evidence *aliunde* the notice, showing that the appellee understood to what the notice referred, should be rejected. *Hardware Co. v. Taylor*, 22 Mo. App. 513. (5) The contents of the notice were facts to be proven and not presumed. There is a total absence of evidence showing that the pretended notice served by Horine was signed by anyone. To have been valid it must have been signed by the defendant or its attorney. *Igo v. Bradford*, 110 Mo. App. 675. (6) Notice of appeal like

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notice to sue stand in a class largely to themselves and the mode for giving them effect must be strictly followed as required by the statute. Conway v. Campbell, 38 Mo. App. 473-6. (7) As to summary or *ex parte* and a *fortiori* as to extra official proceedings, the party claiming under them must make strict proof of the performance of every prerequisite of the law. 16 Cyc. 1078; Fouke v. Jackson, 84 Iowa, 616, 51 N. W. 71; Houston v. Perry, 3 Tex. 390. (8) As a general rule presumptions of regularity do not extend to jurisdictional facts. 16 Cyc. 1076; Mills Co. v. Hamaker, 11 Iowa, 206. (9) There can be no presumption as against the positive requirement of the statute as to notice of appeal. Langford v. Few, 146 Mo. 154.

Wm. H. Horine and J. T. White for respondent.

(1) Neither the plaintiff's alleged motion to affirm the judgment of the justice nor his alleged motion to set aside the judgment of the circuit court, is signed by the plaintiff or his attorneys. This is an absolute requirement of the statute. R. S. 1909, sec. 1822. (2) Appellant's alleged motion to set aside the judgment of the circuit court, which is in effect a motion for a new trial, if it is anything, failed to assign any error committed by the trial court. The only error assigned in appellant's brief is the action of the trial court in overruling his motion to affirm the judgment of the justice; his motion for a new trial failed to mention the ruling or to refer to it in any remote way. The trial court was not apprised by this motion that a motion to affirm had ever been filed or ruled upon. That being the case, the Court of Appeals will not review that alleged error. Lynch v. Railroad, 208 Mo., 42, 43, 44; Dazey v. Laurence, 153 Mo. App. 422; Barns v. Waltke & Co., 135 Mo. App. 491; Security Co. v. Williams, 143 Mo. App. 324.

(3) Appellant complains that the notice of appeal was not properly proven as to its form and contents. The objection that the trial court erred in holding the notice sufficient is not available to appellant now for the following reasons: (a) The alleged error of the trial court in receiving the evidence and in ruling the notice sufficient in form was not mentioned in the appellant's motion for a new trial. See cases cited under 2. (b) The oral evidence in regard to the notice of appeal was received without objection either as to the competency or sufficiency. It was not suggested at the trial that oral evidence was a conclusion, improper to prove a written notice or that the evidence introduced was not specific enough. In fact the trial court was allowed to believe that the notice was sufficient in form and substance. It is too late now to object to it on either ground. If objection had been made at the time, defendant could have had opportunity to produce the notice or show its loss and give in detail its contents. Meyer v. School District, 96 Mo. App. 50, 51, Freeland v. Williamson, 220 Mo. 231; Shelton v. Franklin, 224 Mo. 353, 354; Interman v. Carmin, 142 Mo. App. 526; Wayne Co. v. Railroad, 66 Mo. 77. (4) Appellant having tried the matter of its motion to affirm the judgment of the justice upon one theory, this court will determine it upon the same theory. The only objection urged at the time for the want of notice, was that it was served upon the wrong party. It was not suggested or intimated that the notice was insufficient or informal in any manner. This court will not now hear suggestions as to such insufficiency. Manzke v. Goldenburg, 149 Mo. App. 12; Hume v. Hail, 146 Mo. App. 659; Novelty Co. v. Pratt, 21 Mo. App. 171. (5) The trial court having found upon the issues presented that a proper notice was served upon the plaintiff, that finding must stand as long as there was sufficient evidence to sustain it. It is not necessary to cite authorities on a proposition

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so often ruled. It cannot be denied that there was some evidence to sustain the ruling. (6) The presumption of regularity attaches to judicial proceedings, and the burden is now on appellant to overcome the presumption that the action of the trial court was regular. This appellate court will not review the ruling and the finding of the trial court upon the evidence produced before it, where the evidence in its entirety is not presented in appellant's abstract of record. Appellant's abstract of the record presents only a brief summary of the evidence. Therefore it will be presumed that the finding of the trial court was correct:

STURGIS, J.—We think this is a proper case in which to remind attorneys that while the courts are disposed to be liberal and waive technicalities in the matter of preparing abstracts of the record, yet, it is not intended to relieve the appellant of the duty of furnishing an abstract of the record and to substitute therefor a mere statement in narrative form of what took place in the trial court. This is especially true of the record proper and the motions and orders made. It is not necessary that they be copied in full but the substance of the same should be stated and not merely that a certain kind of pleading was filed and judgment rendered, or that a certain kind of motion was filed and an order made thereon. The evidence should be stated in narrative form, unless the questions and answers are necessary to a proper understanding of some particular point or ruling; but the abstract of the record and other court proceedings should show not only the kind of pleadings, judgments, motions and orders that were had and when, but also the substance at least of each should be set out, and when necessary to a full understanding of the case such matters must be set out in full. This has no reference to the matters specially covered by rule thirty-two

and the exception to rule fifteen. As this case presents but a single point for review and the parties are agreed as to what actually took place in the trial court, we will treat the abstract as being sufficient.

This case originated in a justice court of Green county, Missouri. A change of venue was taken to another justice in that county, where a judgment by default was taken in favor of plaintiff against the defendant. The defendant then appealed to the circuit court, where plaintiff's suit was finally dismissed for failure to prosecute. The appeal was not taken on the day on which the judgment was rendered. In the meantime, however, a motion to affirm the judgment for failure to give notice of the appeal as required by section 7582, Revised Statutes 1909, was filed and overruled. The motion to affirm the judgment was filed at the second term of the circuit court after the appeal was taken and it is conceded that the judgment should be affirmed unless the appellee did in fact give the proper notice of appeal at least ten days before that term. The statute in question does not require that the notice of appeal and proof of service be filed with the trial court but the usual and proper practice is to do this so as to avoid controversies of this character. [Drake v. Correll, 127 Mo. App. 636, 639, 106 S. W. 1080.] When a notice to affirm a judgment for failure to give proper and timely notice of the appeal has been filed this raises an issue of fact and the court may hear evidence thereon. [Calderwood v. Robertson, 112 Mo. App. 103, 105, 86 S. W. 879.]

In this case the court heard evidence and it appears that there was a dispute as to whether the attorney who brought the suit was also attorney for the plaintiff in the justice court to which the case was removed by change of venue and where the justice's judgment was rendered. The plaintiff claims that the attorney who brought the suit did not repre-

sent him after the change of venue was taken from the first justice. That attorney, however, was under the impression that he was still retained in the case until it was lodged in the circuit court and he then learned that another attorney had been employed by plaintiff. If any notice of the appeal was served it is conceded that the service was had on the attorney who instituted plaintiff's suit. On the question of serving the notice, Mr. Moon, the attorney who brought the suit for plaintiff, testified: "I remember one morning we stood over there by the stove and you talked about compromising the case and you served some kind of a notice on me. At that time I had every reason to believe that I represented the plaintiff." Mr. Horine, attorney for defendant, testified: "I served notice of appeal on Mr. Moon here in the court room and after the notice was served the plaintiff wanted to settle the case. I served him with notice, that I think was the 25th of March that this notice of appeal was served." The defendant, as appellant in the trial court, claims that this is sufficient proof of the service of notice of appeal. No notice was filed with the case or produced on the hearing of the motion to affirm and nothing is shown as to the character or contents of the notice other than above stated.

The giving of proper and timely notice of an appeal from the justice court, where the appeal is not allowed on the same day the judgment is rendered by the justice, is a matter going to the jurisdiction of the circuit court to hear and determine the case or to do anything other than affirm the judgment, or dismiss the appeal, at the option of the appellee. [Sec. 7584, R. S. 1909.]

It is said in *Roll v. Cummings*, 117 Mo. App. 312, 317, 93 S. W. 864 that: "The service of notice of appeal upon the appellee within the time provided by statute is indispensable to the conferring of jurisdic-

tion over the person of the appellee, except when the giving of such notice is waived by the voluntary general appearance of the appellee. But an appearance for the purpose of raising the question of the court's jurisdiction over the person of the appellee is not a general appearance and therefore not one that dispenses with the necessity of notice." The court then cites a number of authorities, and continues: "Under the foregoing authorities, it is clear that the filing of the motion to affirm was not an appearance of the appellee that waived the service of notice and it is difficult to perceive how the entertainment of that motion by the court in any way prevented its service. The statute points out the method the appellant must pursue to bring his adversary into court. Compliance with its provisions is jurisdictional."

In *Drake v. Correll*, 127 Mo. App. 636, 638-9, 106 S. W. 1080 the court said: "While it is stated in *Ellis v. Keys*, 47 Mo. App. 155, and in *State to use v. Hammond*, 92 Mo. App. 231, that where no notice of appeal is given, there is no jurisdiction of the cause, yet it is clear that jurisdiction of the person is what is meant. . . . The failure of the garnishee to give notice of appeal in accordance with the statute constituted a failure to confer jurisdiction in the circuit court over the person of the plaintiff and deprived it of authority to make any other disposition of the cause than to affirm the judgment of the justice or dismiss the appeal at the election of plaintiff. In such state of case, the plaintiff could not be in default since he had not been brought into court and, manifestly, it was error for the court to treat him as one in default by dismissing his case. . . . Counsel argues that the statute (section 4074, now section 7582) does not require the filing of the notice and that the service of the statutory notice of the appeal is all that is required to confer jurisdiction on the circuit court over the appellee. This is true, but the fact that notice

was given, being jurisdictional, must affirmatively appear on the face of the record either by the filing of the notice and the return thereon with the circuit clerk, or by a recital in the judgment or order disposing of the cause, of the fact that the notice was given."

As pointed out in *Cooper v. Accident Company*, 117 Mo. App. 423, 425, 93 S. W. 871, the giving and service of this notice of appeal serves much the same purpose as an original summon, and so it is stated in *State v. Hammond*, 92 Mo. App. 231, 236.

Actual knowledge that the appeal has been taken and the case lodged in the circuit court and docketed and for trial does not dispense with the giving and service of a proper and timely notice of the appeal. [*Jordan v. Bowman*, 28 Mo. App. 608; *Smith Drug Co. v. Hill*, 61 Mo. App. 684; *Cooper v. Accident Co.*, 117 Mo. App. 423, 93 S. W. 871.]

In the *Smith Drug Company* case, supra, the court said: "That the appellee may have understood what was the intention of the appellant, and that the notice was other than what it purported to be, will not aid the faulty notice. The actual knowledge of the appellee that an appeal had been taken will not suffice. He has the legal right to exact the written notice prescribed by the statute. [*The McGinniss & Ingles Co. v. Taylor*, 22 Mo. App. 513; *Hammond v. Kroff*, 36 Mo. App. 118.]"

In *McGinniss & Ingles Co. v. Taylor*, 22 Mo. App. 513, 516, the court said: "The appellee may have actual knowledge of an appeal being taken. He may stand by and see it perfected, yet he must have the statutory notice, and this notice must describe the cause in which the appeal is taken. If the appellee's knowledge of the appeal does not affect the matter, it would seem that evidence *aliunde* the notice, showing that the appellee understood to what the notice referred, should be rejected."

Brown on Jurisdiction, section 41, speaking of notice and service, says: ". . . where it provides a form, or gives directions as to the manner of service . . . the statute must be complied with strictly; the direction is mandatory. Great particularity is required in notice of appeal . . . it is a thing apart from the knowledge, which the party to be notified, may have. . . . Appellee may have actual knowledge of an appeal being taken. He may stand by and see it perfected, yet he must have the statutory notice, and this notice describe the cause in which the appeal is taken."

It is said in *Jordan v. Bowman*, *supra*, "When the statute prescribes a particular form and manner for the service of a notice, no other form or manner will be effectual for any purpose of the notice, without an acceptance or waiver by the party entitled to receive it."

It is said in *Thomas v. Moore*, 46 Mo. App. 22, 27, that great particularity is required in giving notices of appeal. An examination of the adjudicated cases will show that our courts have always held that it is not sufficient merely to show that some sort of a notice was given and served on the opposite party, but that it must be shown that the notice so served was in writing and contained certain essential particulars in order to give the court jurisdiction over the appellee. The statute in question, section 7582, requires that the notice be in writing and that it state that an appeal has been taken from the judgment therein specified. Some of the essentials of a proper notice of appeal, in addition to its being in writing, are that such writing: (1) designate the names of the parties to the suit (*McGinniss & Ingles Co. v. Taylor*, 22 Mo. App. 513; *Stone v. Baer*, 82 Mo. App. 339; *State to use v. Hammond*, 92 Mo. App. 231); (2) that it give the correct date, if any date at all, of the judgment of the justice of the peace appealed from (*Cooper v. Accident*

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Co., 117 Mo. App. 423, 93 S. W. 871; Clay v. Turner, 135 Mo. App. 596, 116 S. W. 480; Hammond v. Kroff, 36 Mo. App. 118); (3) that it correctly designate and describe what judgment was appealed from (Smith Drug Co. v. Hill, 61 Mo App. 680, 684; Tiffin v. Millington, 3 Mo. 419); (4) must be signed by the party appealing or his agent or attorney (Cella v. Schnairs, 42 Mo. App. 316; Igo v. Bradford, 110 Mo. App. 670, 85 S. W. 618).

A notice, although in writing and properly served on the appellee, will not bring him into court for the purpose of the appeal and will not confer jurisdiction of the circuit court to do anything in the case other than affirm the judgment or dismiss the appeal, unless it contain these, and perhaps other, essential elements.

Where the appellee has not appeared to a cause generally and thereby waived the question of jurisdiction over his person, it would seem not to be necessary that he even file a formal motion to have the court affirm the judgment or dismiss the appeal; but that the court must of its own motion take such action in the absence of an affirmative showing that a proper and timely notice of appeal has been served. Such is the holding in Drake v. Correll, 127 Mo. App. 636, 106 S. W. 1080; Butler v. Pierce, 115 Mo. App. 40, 90 S. W. 425; Smith Drug Co. v. Hill, 61 Mo. App. 680.

The plaintiff in this case makes the point that as Mr. Moon, the attorney who instituted the suit for plaintiff, did not appear for him in the justice court, after the change of venue, in which the judgment appealed from was actually rendered, that he did not come within the provisions of the statute permitting the notice of appeal to be served on the appellee, "or if the appellee shall have appeared to the suit before the justice either by agent or attorney, said notice may be served on said agent or attorney." The evidence, however, tends to show that after the change of venue from the first justice was taken it was mut-

ually agreed between the attorneys for the respective parties that neither of them would attend the trial but that judgment might be taken by default and that the defendant would then appeal. We think the statute does not mean that the attorney for the appellee should actually be present in the justice court at the time the judgment is rendered, but that it is sufficient if the facts show that the attorney, though not actually present, was in fact representing the appellee in the justice court rendering the judgment.

The difficulty in this case is that, although Mr. Moon may have been a proper person on whom to serve the notice of appeal, yet the plaintiff challenged the sufficiency of the notice served on him by his motion to affirm and to set aside the judgment dismissing his case by stating that: "Defendant failed to give plaintiff a notice of appeal as required by law." As this is a jurisdictional fact, it is evident from the authorities above cited that it was incumbent upon defendant to prove, not only that he had given and served a notice of appeal of some sort, but that such notice was in writing, and that it contained the essential features of a good notice of an appeal. This he failed to do.

It is not seriously contended that plaintiff entered his appearance generally or in any way waived a timely and sufficient notice of the appeal. The contention is that by not objecting to the evidence that some kind of a notice was served on the specific ground that it was not in writing, the plaintiff waived proof of that fact. That evidence, however, was directed to and was admissible to show another essential fact, to-wit, the service on a person authorized to receive service; and might and ought to have been followed by proof of the kind of notice and its contents by the production of the notice itself, or a copy thereof, or, if lost or destroyed, by proof of its contents. The objection mentioned, if made, should have been over-

ruled as it was not known whether or not the defendant could and would follow it up by proof of the other essential facts. Evidence cannot be successfully objected to which is properly admissible in proof of any issue. It was essential for defendant to prove that the notice of appeal was in writing; that it was served in proper time and on a person authorized to receive it; that it was served in the manner provided by the statute; and that it was in the form and contained the essentials of a proper notice of appeal. That the evidence shows that this was done in part is not sufficient.

The point is made that plaintiff's motion to set aside the judgment dismissing his cause for failure to prosecute same, after his motion to affirm had been overruled, does not complain of the court's error in overruling this motion to affirm for want of sufficient and timely notice of the appeal. We will not discuss the question of the necessity of even this motion to set aside the judgment dismissing the case in order to make the point in question available on an appeal, as it certainly served the purpose of giving the court a last chance to correct its former error in not affirming the judgment. What we have heretofore said as to there being no necessity of any formal motion to affirm, though such is proper where no notice of appeal is shown to have been given, disposes of this contention.

As the defendant insists that he did in fact serve a timely and proper notice of appeal, the case will be reversed and remanded with directions to set aside the judgment dismissing the cause; and to again hear the motion to affirm the judgment for failure to give proper notice of the appeal and take such subsequent action as may be necessary in conformity to this opinion.

Farrington, J., concurs. *Robinson, P. J.*, dissents in part and files separate opinion.

DISSENTING OPINION.

ROBERTSON, P. J.—My objection to the majority opinion is on the question of the proof of service of the notice of appeal therein discussed. When the attorney for the respondent testified that he had served the notice of appeal, he being one who possesses knowledge of the essentials of such notice, and no objections in this case being interposed that it was not the best evidence or that it called for the conclusion of the witness, I think that this furnished sufficient evidence upon which to uphold the finding of the trial court that such notice as required by law was served.

STATE OF MISSOURI, Respondent, v. MILTON KROUSE and ANDREW KROUSE, Appellants.

Springfield Court of Appeals, May 5, 1913.

1. CRIMINAL LAW: False Pretenses: Statutes Relating to: Effect of Amendatory Statute. The provisions of Sec. 4564, R. S. 1909, and the amendment, Acts 1911, page 194, relating to the offense of false pretenses, are examined under the provisions of Sec. 4920, R. S. 1909, and their intemds are construed. *Held*, in the present case that the defendants were properly charged under Sec. 4565, R. S. 1909, and that the trial court properly gave defendants the benefit of Session Acts 1911, page 194, in the instructions concerning the degree of punishment.
2. _____: _____: Jurisdiction of Appeal. In a prosecution for obtaining money under false pretenses, where the jury under proper instructions fixed the punishment at a fine of \$20, the jurisdiction of the case on an appeal was with the Court of Appeals.
3. CRIMES: False Pretenses: Requisites of Offense: Promises Concerning Future Events. To constitute the crime of obtaining money or property by false pretenses, it is requisite that the false pretenses should be either concerning a past event or concerning some fact having a present existence.

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4. FALSE PRETENSES: Promises Concerning Future Events:

Do Not Constitute. In a prosecution for obtaining money under false pretenses, where it appears from the testimony of the prosecuting witness that he advanced the money partly on the promise that certain railroad ties would be delivered in the future and partly on the promise that defendants would "make him whole" on another contract, *held* that the evidence failed to establish the charge of obtaining money under false pretenses.

Appeal from Taney County Circuit Court.—*Hon. John T. Moore*, Judge.

REVERSED.

No briefs filed.

FARRINGTON, J.—This is an appeal from a judgment of conviction for obtaining money under false pretenses. The prosecution grew out of a sale of railroad ties, the prosecuting witness, Levi Russell, claiming that he contracted for and paid for 300 ties and received only 243. It appears from all the testimony that no money was paid by the prosecuting witness to the defendants, but that defendants' land was advertised to be sold for delinquent taxes and the prosecuting witness paid them, according to his testimony, at defendants' request, and that he later satisfied a judgment against the defendants, and it was by these payments that the prosecuting witness paid for the 300 ties.

The statute (Sec. 4565, R. S. 1909), so far as it pertains to this case, is as follows: "Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretense, . . . obtain from any person any money, personal property, right in action or other valuable thing or effects whatsoever, . . . shall, upon conviction thereof, be punished by imprisonment in the penitentiary for a term not exceeding seven years."

This section was amended in 1911 (Session Acts, p. 194) by striking out the words "by imprisonment in the penitentiary for a term not exceeding seven years" and inserting in lieu thereof the words "in the same manner and to the same extent as for feloniously stealing the money, property or things so obtained"; so that the clause prescribing the punishment now stands precisely as it was in section 1927, Revised Statutes 1899, except that the word "thing" near the end of the clause is changed to "things." This amendment of 1911 was approved March 30, 1911, and did not become operative until ninety days after the adjournment of the Legislature (Sec. 8061, R. S. 1909), which occurred on March 20, 1911 (Session Acts, 1911, p. 452). This case was tried at the October term, 1911, of the circuit court of Taney county, and the money which is alleged to have been obtained by defendants by means of false pretenses was paid by the prosecuting witness on the first and third days of April, 1911. Section 4565, Revised Statutes 1909, was still in force at the time, and hence the defendants were properly charged under it. [State v. Mathews, 14 Mo. 133.] Section 4920, Revised Statutes 1909, is as follows: "No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision shall be repealed or amended, shall be affected by such repeal or amendment, but the trial and punishment of all such offenses, and the recovery of such fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except that all such proceedings shall be conducted according to existing laws: *Provided*, that if the penalty or punishment for any offense be reduced or lessened by any alteration of the law creating the offense, such penalty or punishment shall be assessed according to the amendatory law." The trial court therefore rightly gave the defendants the benefit of

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this statute in the instructions by defining the punishment, if any, according to section 4548, Revised Statutes 1909, relating to petit larceny, and the jury in their verdict fixed the punishment at a fine of twenty dollars against each defendant. All of the foregoing merely goes to show that the appeal has been lodged in the proper appellate court.

At the close of the State's evidence in chief and again at the close of all the evidence, defendants tendered and the court refused to give a peremptory instruction, of which complaint is made in the motion for a new trial.

In his statement to the jury, before any testimony was heard, the prosecuting attorney said: "On this date the Krouses had to have so much money to pay an obligation and Mr. Russell wrote them a check.

. . . That was a little more than the ties were worth. They represented they had three hundred go ties, and he gave them this money, which was a little more than the ties, and they agreed at that time to continue making ties and selling to him on this basis, to finish paying this money, and a former proposition. They fell short on it the winter before—sometime in the winter before they fell short on another contract of fifty-nine dollars, and they agreed to continue making and taking up this shortage as an inducement to get this money." The defendants' objection that this statement relates to a future promise and does not tend to prove any false pretense, was overruled. During the examination of the prosecuting witness, the State's attorney said: "He paid them more money on this contract than the three hundred ties were worth, under the agreement and promise that they would make more ties. As I understand him, at the time he made this contract for three hundred they also promised to make up and pay for what they got over before."

The prosecuting witness, Levi Russell, testifying concerning the transaction involving the 300 ties, was

asked on direct examination, "What else did they tell you as an inducement to get this money?" and the witness answered, "I told them I wanted all the ties to pass the inspection and they said they would make me ties and furnish us—" (interrupted). Defendants entered the objection to this testimony that it does not show a false pretense, but a future promise, as to which there was no ruling and defendants objected and except to the action of the court in failing to rule. During the cross-examination of this witness, the following appears: "Q. Did they tell you they had the ties at the time you paid Jim Reese? A. Yes, sir; before. Q. At the time you paid it did they tell you they had three hundred ties in the woods? A. They told me they would let me have three hundred ties." Again: "Q. They promised to make more ties for you, did they not? A. Yes, sir. Q. And on that promise you paid this tax and judgment? A. Yes, sir. Q. On the promise of what they said they would do, you paid them? A. On the promise that they had three hundred ties. Q. You had a conversation with them about this since then? A. Yes, sir. Q. You said that if they didn't pay you, you would pull them? A. I told them that I wanted my money or the ties and they said they were not going to make me any more ties and I asked if they were going to pay the money, and they said no, they didn't owe me anything."

W. M. Bunch, testified for the State that he was present at the time the contract was made between the prosecuting witness and the defendants, but did not hear it; that one of the defendants then came and asked him to haul the ties, saying they had sold Levi Russell three hundred ties and that they didn't have all of them made, but would have before they could get them hauled.

Levi Russell was called by the defendants and testified: "I branded them at Garber and we counted

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them and I asked how many ties he had in the woods and he said, 'I have made a mistake, it is only two hundred eighty-six with these and the ones in the woods, and I will finish them up in good ties.' Q. He told you he had two hundred eighty at that time? A. He told me he had two hundred eighty-six. Q. Before you paid the judgment, you took up one hundred seventy ties and branded them? A. Yes, sir; somewhere along there. Q. He told you then there wasn't three hundred in the woods? A. He said, 'We made a mistake, there are two hundred eighty-six with these and I will finish out the balance of the three hundred.' "

A mere promise to do something, relating as it does to a future event, is not within the statute. In order to constitute the crime of obtaining money or property by false pretenses, it is requisite that the false pretense should be either of a past event, or of some fact having a present existence, and it cannot consist of a promise to do something or of some event to happen in the future. [State v. Petty, 119 Mo. 425, 24 S. W. 1010.] "A promise is not a pretense." [2 Bishop Crim. Law, sec. 419.] "And both in the nature of things and in actual adjudication, the doctrine is that no representation of a future event, whether in the form of a promise or not, can be a pretense within the statute, for it must relate either to the past or present." [Ib., sec. 420; State v. DeLay, 93 Mo. l. c. 102, 5 S. W. 607, and cases cited.]

The evidence in this case discloses that practically all the witnesses for the State swore that the two defendants and their witnesses have a bad reputation for truth and veracity in the communities in which they reside, and that practically all the witnesses for the defense swore that the prosecuting witness and other State witnesses have a reputation in that regard which is no more enviable. The strongest phase of the case made against the defendants is that dis-

closed in the testimony of the prosecuting witness, and the evidence shows that he threatened to "pull" the defendants for obtaining money under false pretenses unless they paid back his money or gave him the ties. It appears from his testimony, only a small part of which appears in this opinion, that he advanced the money at least *partly* on the promise that ties would be delivered in the future and *partly* on the promise that defendants would make him whole on some other contract. This establishes no offense under the laws of this State. The criminal courts of Missouri are not to be appealed to when credit has been erroneously extended. The judgment is reversed and the defendants discharged. All concur.

J. W. JACKSON, Respondent, v. SOUTHWEST MISSOURI RAILROAD COMPANY, Appellant.

Springfield Court of Appeals, May 5, 1913.

1. **PLEADINGS: Amendments: Refusal to Grant Continuance: Not Error, When.** In an action against a street railroad company for personal injuries, at the close of his evidence, plaintiff by leave of court, amended his petition by inserting a third ground of negligence which was substantially the same as one alleged in a count of the original petition. *Held*, that the refusal of the trial court to grant a continuance to defendant on the ground of surprise was not such an abuse of its discretion as to call for a reversal of the case.
2. **CARRIERS: Warning Signals Required: Statute Examined.** Sec. 3140, R. S. 1909, requiring a bell to be placed on all locomotive engines to be rung at least 80 rods from public crossings and kept ringing until it shall cross the road, or that a steam whistle be attached to the engine and shall be sounded and kept sounding at intervals for that distance, is examined as to its applicability to interurban cars propelled by electricity, and authorities *pro* and *con* are cited.

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3. **STREET RAILROADS: Signals of Warning: Crossings.** Persons operating an electric road and its cars are required, regardless of statute, to give at roadway crossings effective and timely warnings, commensurate with the speed and danger likely to result from running the cars.
4. **INSTRUCTIONS: Error in: Appellant Cannot Complain of Error in His Favor.** In an action against a street railroad for personal injuries where several grounds of negligence are alleged, an instruction drawn in the conjunctive, requiring the jury to find defendant guilty of all the acts of negligence charged as the condition of a verdict for plaintiff, furnished no ground for complaint on the part of the defendant, inasmuch as it imposed on the plaintiff the duty of proving more than the law required in order to make a case and was favorable to the defendant rather than adverse.
5. **NEGLIGENCE: Alleging Several Grounds of: Proof of One Sufficient.** In an action against a street railroad company for personal injuries, where an instruction predicates plaintiff's right to recover on several grounds of negligence, all of which must be found for the plaintiff before he can recover, *held* that it is sufficient to sustain a judgment for plaintiff if any one of such grounds constitutes actionable negligence and is supported by the evidence.
6. **NEGLIGENCE: Personal Injuries: Evidence Reviewed.** In an action against a street railroad company for personal injuries on account of negligence, the evidence is examined and reviewed and *held* sufficient to warrant the jury in finding the defendant guilty of actionable negligence.
7. **NEGLIGENCE: Personal Injuries: Contributory Negligence.** In an action against a street railroad company for personal injuries occasioned by a collision between one of defendant's cars and a motor cycle ridden by plaintiff, the evidence is examined and reviewed and *held* to warrant the jury in finding the plaintiff not guilty of contributory negligence.
8. **STREET RAILROADS: Crossings: Duty of Traveler: Contributory Negligence.** A railroad is in and of itself a warning of danger and it is the duty of a traveler crossing same to look and listen for coming trains, and failure to do so is negligence *per se* contributing to any injury received by him, and in such case no amount of negligence on the part of the defendant will warrant a recovery.
9. **RAILROADS: Crossings: Traveler's Duty Continuous: Dependent on Circumstances.** The duty of a traveler approaching a railroad crossing to use reasonable care to ascertain the approach of a train in dangerous proximity, is a continuous duty. Yet no fixed standard can be set up to govern in all cases;

and to determine whether or not the injured person was guilty of contributory negligence, the method of travel of such person must be considered, also the speed at which he was traveling as well as the speed of the train and whether or not his view was obstructed.

10. **STREET RAILROADS: Crossings: Traveler's Rights and Duties.** A traveler approaching a railroad crossing has a right to presume that the railroad company will run its cars at a lawful rate of speed and that timely signals will be given as the car approaches the crossing. Yet he is not permitted to rely on such presumption to the extent that he may neglect his own duty in using care to look and listen for the approach of such car.
11. **STREET RAILROADS: Crossings: Care Required of Traveler.** A traveler approaching a railroad crossing is only required to use ordinary care to look and listen for approaching cars.
12. **EVIDENCE: Directing Verdict: Province of Court and Jury.** Where the evidence is such that there cannot be two opinions about it, its effect should be declared by the court as a matter of law, otherwise it is a question of fact for the jury.
13. **STREET RAILROADS: Injury by Collision Contributory Negligence.** In an action against a street railroad company for personal injuries occasioned by a collision at a street crossing between one of the defendant's cars and a motor cycle on which plaintiff was riding, the evidence relative to plaintiff's contributory negligence is examined and reviewed. *Held*, that the trial court properly refused to direct the verdict for the defendant on that ground.
14. **INSTRUCTIONS: Refusal: When Proper.** (a) A requested instruction that it was negligence for the plaintiff approaching a railroad crossing on a motor cycle not to stop or check his motor cycle to enable him to see and hear the approaching car, regardless of his speed, was properly refused. (b) An instruction should not be given unless there is evidence on which to base it. (c) Instructions are properly refused when based upon a dismissed count of a petition. (d) Instructions not based upon any issue in the case are properly refused. (e) An instruction should not be given when other instructions sufficiently covering the same matters have already been given.

Appeal from Jasper Circuit Court, Division Number Two.—*Hon. David E. Blair*, Judge

AFFIRMED.

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McCoy & Halliburton for appellant.

(1) Defendant's peremptory instruction to find for the defendant should have been given and in refusing to give it the court committed error. *San-guinette v. Railroad*, 196 Mo. 466; *Hayden v. Railroad*, 124 Mo. 566; *Huggart v. Railroad*, 134 Mo. 673; *Schmidt v. Railroad*, 191 Mo. 215; *Kenney v. Railroad*, 105 Mo. 284; *Porter v. Railroad*, 199 Mo. 82; *Baker v. Railroad*, 122 Mo. 533; *Butts v. Railroad*, 98 Mo. 272; *Walker v. Railroad*, 193 Mo. 453; *Guyer v. Railroad*, 174 Mo. 344; *Green v. Railroad*, 192 Mo. 131; *Mockowick v. Railroad*, 196 Mo. 550; *Boyd v. Railroad*, 105 Mo. 371; *Stoller v. Railroad*, 204 Mo. 619; *Boring v. Railroad*, 194 Mo. 541; *Reno v. Railroad*, 180 Mo. 469; *Hayden v. Railroad*, 124 Mo. 566; *Kreis v. Railroad*, 148 Mo. 325; *Hook v. Railroad*, 162 Mo. 569; *Grout v. Railroad*, 135 Mo. 552; *Laun v. Railroad*, 216 Mo. 563; *Holland v. Railroad*, 210 Mo. 338; *Stotler v. Railroad*, 204 Mo. 619; *McCreery v. United Railways Co.*, 221 Mo. 18; *Clark v. Railroad*, 242 Mo. 570, 148 S. W. 472; *Burge v. Railroad*, 244 Mo. 76, 148 S. W. 925. (2) The court submitted to the jury the question of whether acts of the defendant were negligently done without anywhere defining negligence, which was error. *Cowan v. Phillips*, 160 Mo. App. 541; *Dalton v. Redemeyer*, 154 Mo. App. 197; *Cornett v. Railroad*, 158 Mo. App. 368; *Magrame v. Railroad*, 183 Mo. 132; *Allen v. Transit Co.*, 183 Mo. 432. (3) The defendant's car tracks being laid on its private right of way, running at a speed in excess of that provided by the city ordinances of Webb City is not negligence *per se*, and the court erred in so instructing the jury. *Turney v. United Railways Co.*, 155 Mo. App. 513. (4) Sec. 3140, R. S. 1909, requiring locomotives to give signals at public crossings, does not and cannot apply to electric interurban street rail-

roads. *Fallon v. Street Railway*, 50 N. E. 546; *Bank v. Horse Railroad Co.*, 13 Allen, 105; *Transit Co. v. Andis*, 72 N. E. 145; *Stranahan v. Railroad*, 84 N. Y. 308; *Murphy v. Wilson*, 27 Alb. Law J. 505. (5) Plaintiff's second and third instructions are improper declarations of the law, in failing to require of plaintiff all that the law requires when about to cross a railroad track, and assuming failure to give warning sufficient to notify plaintiff of approach of car, and are in conflict with instruction C, given for defendant. *Barrie v. Transit Co.*, 102 Mo. App. 87; *Asphalt & Granitoid Cons. Co. v. Transit Co.*, 102 Mo. App. 469; *Fanning v. Transit Co.*, 103 Mo. App. 151; *Reno v. Railroad*, 180 Mo. 469; *Fenz v. Railroad*, 106 Mo. App. 154; *Watson v. Street Railway*, 133 Mo. 246; *Ledwidge v. Transit Co.*, 73 S. W. 1008; *Ries v. Transit Co.*, 179 Mo. 11; *Gettys v. Transit Co.*, 103 Mo. App. 564; *Roenfeldt v. Railroad*, 180 Mo. 554; *Moore v. Railroad*, 176 Mo. 528. (6) Instruction 1, asked by defendant, should have been given. The evidence shows that plaintiff was blind in his left eye and the authorities are united on the proposition that a person with defective sight or hearing is obligated to use more care and caution in attempting to cross a railroad track. *Cundee v. Railroad*, 130 Mo. 142; *Paris v. Railroad*, 72 Mo. 169; *Tyler v. Sites, Admr.*, 88 Va. 470; 2 Shear. and Red. on Neg., sec. 481; 2 Wood on Railroads (Minor's Ed. 1894), pp. 1446, 1556; Booth Street Railway Law, sec. 386; Patterson's Ry. Acc. Law, p. 75; Wharton on Negligence (2 Ed.), sec. 307; Whittaker's Smith on Negligence, p. 403; *Maupin v. Miller*, 164 Mo. App. 145, 48 S. W. 141. (7) A motor-man on electric railway car is not required to stop or check his car on seeing a party approaching track (except children), as he has the right to assume the party will observe reasonable precautions and prudence to avoid danger, and the court erred in refusing defendant's instruction K. *Boyd v. Railroad*, 105 Mo.

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371; Bunyan v. Railroad, 127 Mo. 12; Aldrich v. Transit Co., 101 Mo. App. 77; Reno v. Railroad, 180 Mo. 469-486; McGanty v. Railroad, 179 Mo. 583; Petty v. Railroad, 179 Mo. 666. (8) The court should have given defendant's instruction M, as said instruction properly declares the law and there is evidence upon which to base it. Aldrich v. Transit Co., 101 Mo. App. 89, 90; Brewing Assn. v. Talbott, 141 Mo. 674; Fuchs v. St. Louis, 133 Mo. 168; Boyd v. Railroad, 105 Mo. 371; Hill v. Drug Co., 140 Mo. 433; Bennett v. Terminal R. R. Assn., 145 S. W. 435; Dyrez v. Railroad, 141 S. W. 865; Green v. Railroad, 192 Mo. 131; Schmidt v. Railroad, 191 Mo. 215; Mocowick v. Railroad, 196 Mo. 570; Stotler v. Railroad, 204 Mo. 619; Eppstein v. Railroad, 197 Mo. 733; Laun v. Railroad, 216 Mo. 563. (9) The court erred in not continuing on plaintiff's amendment of the petition by interlineation and defendant's affidavit of surprise, as the affidavit showed good grounds for surprise and for continuance. Sec. 1961, R. S. 1909; Turnstall v. Hamilton, 8 Mo. 500. (10) The court should have excluded the evidence offered to show extension of the limits of Webb City, and refused any and all instructions based on the railroad track being within the limits of Webb City, because, first, the evidence was insufficient to show an extension; second, because the evidence shows the said extension to be unreasonable, and 3d, because the street railroad track being laid on its private right of way, the speed ordinance of Webb City is not controlling.

R. A. Mooneyhan, Norman A. Cox and Hugh Dabbs for respondent.

(1) The trial court did not err in refusing defendant's peremptory instruction at the close of all the evidence in the case. Woodward v. Railroad, 152 Mo. App. 468; Weller v. Railroad, 120 Mo. 653; Maness

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v. J. & P. R. Co., 149 Mo. App. 259; Gratiot v. Railroad, 116 Mo. 450; Moore v. Railroad, 157 Mo. App. 65; Petty v. Railroad, 88 Mo. 318; Connor v. Railroad, 149 Mo. App. 687; Lang v. Railload, 115 Mo. App. 498; Crumpley v. Hannibal & St. J., 111 Mo. 158; Donohue v. Railroad, 91 Mo. 363; 3 Elliott on Railroads, sec. 1096bq; Weller v. Railroad, 164 Mo. 180; Baker v. Railroad, 147 Mo. 140; Riska v. Union Depot Co., 180 Mo. 187; Davidson v. Railroad, 164 Mo. App. 701. (2) The court properly defined negligence, but this was unnecessary in this case, as the instruction hypothecated facts which constitute negligence in law. Sweeney v. Railroad, 150 Mo. 401; Magrane v. Railroad, 183 Mo. 132. (3) Defendant was subject to the ordinances of the city of Webb City, regulating the speed of its cars, notwithstanding its tracks were laid on its private right of way. Dillon on Municipal Corporations (5 Ed.), sec. 716, 717 and 1272; Crowley v. Railroad, 65 Iowa, 658. (4) Sec. 3140, R. S. 1909, does apply to the defendant in this case. Secs. 3213, 3214, R. S. 1909; Baker v. Railroad, 147 Mo. 155; Railroad v. Wheeler, 63 Ill. App. 193; Booth on Street Railways (2 Ed.), sec. 431; Railroad v. Jacobs, 12 L. R. A. (Ala.) 830; Railroad v. Lohe, 67 L. R. A. (Ohio), 637; Aurora v. Traction Co., 81 N. E. 544; Spaulding v. Railroad, 80 N. E. 327; Commonwealth v. Railroad, 133 S. W. 230; Elliott on Railroads (2 Ed.), secs. 1155, 1156, 1158; Railroad v. Moffett, 44 Pac. 67, 54 Kan. 284; Riggs v. Railroad, 120 Mo. App. 355; McQuade v. Railroad, 200 Mo. 1566; Higgins v. Railroad, 197 Mo. 300; 33 Cyc., 665. (5) Instructions 2 and 3 were proper because the evidence shows, according to plaintiff's theory, that he approached the track in the exercise of ordinary care and looked and listened, and when plaintiff did look up the track and listen, and neither saw nor heard a car, he then had a right to presume that no car was coming, and that the agents and servants of defendant would use ordinary care.

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Riska v. Union Depot Co., 180 Mo. 186; Gratoit v. Railroad, 116 Mo. 464; Donohue v. Railroad, 91 Mo. 363; Woodward v. Railroad, 152 Mo. App. 476; Manness v. Railroad, 149 Mo. App. 264; Baker v. Railroad, 147 Mo. 143; Lang v. Railroad, 115 Mo. App. 489; Thompson on Negligence, secs. 1553, 1582 and 1612. See also cases cited under point of this brief. (6) The trial court did not err in refusing instruction 1, asked by defendant, because there is no evidence in the record that plaintiff was hard of hearing. For that reason, this instruction would have been reversible error. (7) The court properly refuse instruction K, requested by appellant. This question was not before the court and it is certainly not error to refuse instructions on propositions of law not in the case. (8) The court did not err in refusing appellant's instruction M. This instruction is an unwarranted comment on the evidence, and the last part of it is absurd, as it undertakes to tell the jury that if the step of defendant's car struck plaintiff and did not strike the motorcycle, plaintiff cannot recover. Scott v. Railroad, 138 Mo. App. 196; Hull v. Transfer Co., 135 Mo. App. 110; Spencer v. Railroad, 152 Mo. App. 118. (9) The court did not err in refusing to continue the cause on account of plaintiff's amendment to the petition, because the amendment did not, in any way, change the issues, or call for evidence of a different kind from that already presented. (10) The ordinance of Webb City introduced in evidence and showing the extension of city limits was properly admitted. The extension was properly made, although that could not be an issue in this case. The validity of the incorporation or extension of the limits of Webb City could not be questioned in a collateral way, but only by *quo warranto* proceedings. The fact that defendant's street railroad was laid on its private right of way through the outskirts of Webb City was no defense to the action, because it was within the corporate limits of

Webb City, and the only way that appellant could challenge the speed ordinance would be on the ground that it was unreasonable. This the appellant did not do in the trial court, and the question cannot be raised for the first time in the appellate court.

STURGIS, J.—The injuries for which plaintiff brought suit and recovered judgment were caused by his coming in collision with one of defendant's inter-urban cars running on its road extending from Carthage, Missouri, through Webb City and Joplin to Galena, Kansas. The cars are propelled by electricity and the road is what is termed a trolley line, running single cars thereon. The collision occurred at a public road crossing south of Webb City. This public road runs east and west and forms the southern boundary of that city. The defendant's car line crosses this at right angles. The plaintiff was traveling eastward along this road on a motorcycle and defendant's car was going south. The result was that they collided at the crossing and plaintiff was severely injured, his skull fractured and he received such permanent injuries therefrom as will justify a judgment of \$7500, provided defendant is to be held responsible for his injury.

As is usual in this class of cases the plaintiff claims that the accident was wholly due to the fault and negligence of defendant. On the other hand the defendant says that plaintiff was not without fault and negligence on his part and that his injuries were caused wholly or partially by his own negligence. The specific acts of negligence set out by plaintiff in his petition are: 1st. Negligently failing to ring the bell or gong thereon at a distance of eighty rods from said crossing and to keep same ringing until said car had crossed said highway; and also failed to sound the whistle on said car at a distance of eighty rods from said crossing and to sound said whistle at intervals

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until said car had crossed said highway; 2nd. Running at a greater rate of speed than fifteen miles per hour in violation of the ordinances of Webb City; 3rd. Negligently approaching the crossing at a rapid and dangerous rate of speed without giving any warning sufficient to notify plaintiff that said car was coming, and negligently failing to ring the bell and sound the whistle on said car at a sufficient distance from said crossing to give plaintiff and persons approaching said crossing along said highway notice of the approach of said car, and negligently failing to give any warning sufficient to notify persons approaching said crossing of the approach of said car.

The answer of defendant, after admitting its incorporation under the general railroad laws of Missouri and its operation of an interurban electric railway system for carrying passengers, is a general denial and this affirmative defense: "Defendant, further answering, says that the accident and injuries, if any, received by plaintiff, were caused solely and wholly by the fault and negligence of the plaintiff in that the plaintiff, riding a motorcycle, approached the track of defendant's railroad from the west at an exceedingly rapid rate of speed, and without looking or listening for a car thereon, when by looking he could have seen, and by listening he could have heard, attempted to cross said railroad, and did cross the west track of said road with his motorcycle, when for some cause or other, plaintiff slipped off the back end of his motorcycle and was caught by the east step of the car running on the west track of said road; all of which was without fault or negligence on the part of this defendant."

The petition was originally in two counts and at the close of his evidence in chief, plaintiff, by leave of court, amended his first count by inserting the third ground of negligence as above mentioned. Thereupon defendant filed an affidavit of surprise and asked for

a continuance. This was refused and the court's action in this respect is assigned as error. As substantially this same ground of negligence was already in the second count of the petition, and so constituted a part of plaintiff's cause of action which defendant was required to meet, its insertion in the first count could not have misled defendant to his injury. At least it was not such an abuse of the court's discretion in such matter as to call for a reversal of the case. This assignment is therefore ruled against the defendant.

It will be noted that there are three grounds of negligence alleged by plaintiff with reference to the running of defendant's car: (1) Exceeding the speed limit of fifteen miles an hour in violation of the ordinances of Webb City; (2) failing to ring the bell or sound the whistle not less than eighty rods from the public crossing as required by statute, section 3140, Revised Statutes 1909, relating to railroads generally; (3) common law negligence in approaching and passing over a much traveled road crossing at a high rate of speed without giving any sufficient and timely alarm or warning of the approaching car. Much is said in the briefs of counsel as to whether or not section 3140, Revised Statutes 1909, requiring a bell to be placed on all locomotive engines and to be rung at least eighty rods from public crossings and kept ringing until it shall cross the road, or that a steam whistle shall be attached to the engine and shall be sounded and kept sounding at intervals for a like distance, should be made to apply to interurban cars propelled by electricity. It is argued by defendant that the reading of said section conclusively refutes the idea that it applies to anything except railroads operated by steam engines. This is an old statute and certainly was not intended when enacted to apply to other than steam railroads. On the other hand it is argued by plaintiff and admitted by defendant that defendant is incor-

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porated under the general railroad act applying to steam railroads and therefore assumed all the obligations and liabilities of steam railroads; that the spirit and intent of the statute is that of public safety and should apply to all rapidly moving and dangerous cars regardless of the motive power. This is a somewhat new question in this State and the excellent briefs of counsel on both sides present most, if not all, the authorities bearing directly or indirectly on this question. The plaintiff cites as supporting his position: Commonwealth v. Railroad, 133 S. W. (Ky.), 230; Baltimore Railroad v. Wheeler, 63 Ill. App. 193; Birmingham Railroad v. Jacobs, 12 L. R. A. (Ala.) 830; Hannah v. Railway, 81 Mo. App. 78. The defendant cites as supporting its contention: Fallon v. Street Railway, 50 N. E. (Mass.) 536; Transit Co. v. Andis, 72 N. E. 145; Stranahan v. Railway, 84 N. Y. 308; Thying v. Railroad, 156 Mass. 13, 30 N. E. 169; Henson v. Railroad, 110 Mo. App. 595, 85 S. W. 597; Jaris v. Hitch, 67 N. E. (Ind.) 1057.

Whatever may be the proper solution of this question as to whether the particular signals and at the particular distances required by statutes primarily intended for steam railroads shall be applied to electric cars running at a high rate of speed through the country, it is of more importance to the instant case to note that all the authorities agree that the persons operating such electric road and cars are required, regardless of statute, to give effective and timely warnings commensurate with the speed and danger likely to result from running the same. [Baker v. Railroad, 147 Mo. 140, 160, 48 S. W. 838; Cincinnati Electric Railroad v. Lohe, 67 L. R. A. (Ohio) 637; Aurora v. Traction Co., 81 N. E. (Ill.) 544; Spalding v. Railroad, 80 N. E. 327; Pacific Railroad v. Moffett, 44 Pac. (Kan.) 67; Elliott on Railroads (2 Ed.), secs. 1155, 1156; Booth on Street Rail-

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roads (2 Ed.), sec. 431; *Hannah v. Railroad*, 81 Mo. App. 78.]

We need not decide this point or discuss the matter further for this reason: The principal instruction given for plaintiff and the only one covering the entire case and directing a verdict for plaintiff is on the conjunctive or cumulative plan as follows: "If the jury find and believe from the evidence in this case that the defendant, on the 30th day of October, 1911, was running and operating an electric railway between Carthage, Missouri, and Galena, Kansas, and through the corporate limits of the city of Webb City, and that the tracks of defendant were laid across a public highway in Jasper county, Missouri near Mount Hope Cemetery, and if the jury further find that defendant's right of way and tracks, from a point more than eighty rods north of said crossing, extended south through the outskirts and in the corporate limits of Webb City, and up to the boundary of said public highway and crossing, and if the jury further find from the evidence that on said day plaintiff was traveling on said highway at the point of crossing of defendant's tracks, and that plaintiff was in the exercise of ordinary care on his part, and that the servants and employees of defendant in charge of the car mentioned in evidence, in operating and running said car negligently failed, in approaching said crossing to ring the bell thereon at a distance of eighty rods therefrom and to keep same ringing until said car had crossed said highway, and also failed, in approaching said crossing, to sound the whistle on said car at a distance of eighty rods from said crossing and to sound said whistle at intervals until said car had crossed said highways—if you so find—and if the jury find that defendant's agents and servants in charge of said car negligently approached said crossing at a rapid and dangerous rate of speed without giving any warning sufficient to notify plaintiff and travelers approaching and about to pass

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over said crossing that said car was coming, and in such a manner as to endanger plaintiff and travelers on said highway, and negligently failed to ring the bell and sound the whistle on said car at a sufficient distance from said crossing to give plaintiff and travelers approaching said crossing along said highway notice of the approach of said car, and if the jury further find that the agents and servants of defendant in charge of said car ran the same on defendant's tracks from a point north of said crossing through the outskirts of Webb City in approaching and up to said crossing—if you so find—at a greater rate of speed than fifteen (15) miles per hour, and that by reason and in consequence of such failures and conduct on the part of defendant, its agents and employees in charge of said car, if any, said car was caused to run against and strike plaintiff, thereby injuring him, you will find the issues in favor of the plaintiff."

It will be noted that this instruction required the jury before finding for plaintiff to find defendant guilty of negligence on all three grounds mentioned in the petition. It is the well settled law that where an instruction predicates plaintiff's recovery on several grounds of negligence, all of which must be found for plaintiff before he can recover, then, if any one of such grounds constitutes actionable negligence and is supported by the evidence, that is sufficient. The defendant cannot complain that the jury were required to and did find more than the law requires in order to make defendant liable. [Kendrick v. Ryus, 225 Mo. 150, 168-9, 123 S. W. 937; Baker v. Railroad, 122 Mo. 533, 548, 26 S. W. 20; Gibler v. Railroad, 129 Mo. App. 93, 101, 107 S. W. 1021.] In the Gibler case just cited, the court, page 101, said: "Complaint is made of the first instruction given for plaintiff, on the ground of lack of evidence to support it. Said instruction submitted to the jury all the charges of negligence made in the petition, and, as said, there was no evidence of

two of them. But, as the instruction was drawn in the conjunctive, and required the jury to find defendant guilty of all the acts of negligence charged as the condition of a verdict for plaintiff, the instruction was favorable to defendant rather than adverse; inasmuch as it imposed on plaintiff the duty to prove more than the law required in order to make a case."

If the defendant was negligent, and the jury found it was, in running its car at a high and dangerous rate of speed in approaching the road crossing in question and did not give adequate and timely warning signals of such approach so as to notify travelers about to pass over the same, that is negligence enough, even if defendant cannot be held to a strict compliance with the statute as to giving such warning signals eighty rods from the crossing.

What has just been said also applies to the rate of speed being in excess of that prescribed by city ordinances. The defendant contends that the place of the accident and its road approaching thereto were not shown to be within the limits of Webb City and so defendant was not governed by the ordinances of said city limiting its speed to fifteen miles per hour in the outskirts of that city; also that as it was then running its car on its private right of way and not on or across any street of that city, such ordinances did not apply. While neither of these contentions can be sustained and without in any way according to the correctness of same, it is sufficient to say that the jury found that defendant was guilty of negligence in the manner above pointed out without any reference to any speed ordinance, and that such other ground of negligence is sufficient for this case.

This brings us to the real questions in the case: Is the evidence sufficient to warrant the jury in finding defendant negligent in running its car at a high rate of speed without giving adequate and timely warning signals in approaching the road crossing in question;

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if so, was the plaintiff also conclusively shown to have been guilty of negligence on his part contributing to the accident in his manner of approaching the crossing and in failing to use due care for his own safety in looking and listening for an approaching car; were these issues presented to the jury by proper instructions?

Taking the evidence most strongly in favor of plaintiff, as we must do on this appeal, we have no difficulty in answering the first of these questions in the affirmative. The motorman in charge of the car admits that he was traveling at twenty-five miles per hour and perhaps more. Other witnesses place the speed at a higher rate. What might be termed the physical facts are that the car was going down grade on a straight track and the motorman says he first saw plaintiff approaching the crossing when his car was some two hundred or two hundred and fifty feet therefrom and that he at once applied the brakes and used every effort to stop the car; and yet the car struck plaintiff with sufficient force to hurl him some forty-five feet over a cattle-guard and he could not stop his car for near two-hundred feet beyond the crossing. This strongly tends to show the high rate of speed. The danger signal, which was such as to attract the attention of a number of witnesses, was sounded at the point where the motorman says he first saw the plaintiff, that is, some two hundred or two hundred and fifty feet from the crossing. Several of these witnesses say that the regular crossing signal, different from the continuous danger signal, was sounded almost immediately before the danger signal and no other signals were given. We think the jury were warranted in finding that the car in question was being run thirty miles or more per hour and that no warning signal was given until the car was within some three hundred to four hundred feet of the crossing and that this constitutes actionable negligence.

Whether plaintiff was conclusively shown to have been guilty of contributory negligence is the difficult point in the case. He also was traveling down grade to within some fifty or sixty feet of the crossing. He says he shut off the power of his motorcycle and was coasting down the hill and approaching the crossing at a speed of four to four and a half miles per hour. The motorman says that when he first saw plaintiff he was about fifty feet from the crossing and he thinks he was going fifteen miles per hour, and that when the alarm was sounded plaintiff tried to stop his motorcycle but failed to do so before reaching the track. Some idea of the respective rates of speed may be had by noting that according to the motorman's statement plaintiff did not go to exceed fifty feet while defendant's car went two hundred to two hundred and fifty feet; that is four or five times as fast. The motorman explained the reason why plaintiff did not pass the crossing ahead of the car, which he certainly would have done if going fifteen miles per hour, by saying that plaintiff was trying to stop and slowed up; but the motorman forgets that he also was trying to stop and had likewise slowed up. The jury therefore were warranted in finding that plaintiff's statement as to his rate of speed in approaching the crossing was substantially as stated by him and was not negligence *per se*.

It is claimed that plaintiff is conclusively shown to have been guilty of negligence in that, while approaching the place of danger, he did not take proper precautions for his own safety in looking and listening for an approaching car when to do so would have avoided the injury. This is the crucial point in the case. There is a wealth of learning on this point and the briefs leave little to be said as to the law; in fact, the difficulty is not in finding and declaring the principles of law applicable to this ground of negligence and counsel for the respective sides do not differ

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much as to the law. The difficulty is in applying the law to the particuar facts of this case. Each case must depend on its own particular facts. In the present case the car was traveling south and plaintiff east. On the west side of defendant's right of way there was a cemetary. There was an office building about one hundred and fifty or one hundred and sixty feet north and fifty feet west of the railroad track measured by the west track on which the car was running. From the south side of this building a stone fence about four feet three inches high extended east some thirty feet, or to within twenty feet of the west track, and then runs south forty-four feet parallel with the track and then curves westward and southward so as to make a corner entrance to the cemetery. There were vines on this wall and columns three or four feet square and seven or eight feet high at intervals. North of the office building was a wire fence running north and thence east to a cattle-guard two hundred and fifty feet north of the crossing. Near or along this fence and still further north were trees and bushes, some witnesses say trimmed high and others say not much higher than the fence.

Plaintiff says that on account of these obstructions he could not see up defendant's track as far as the cattle-guard, two-hundred and fifty feet from the crossing, until within less than fifty feet of same; at which point he could see past the northeast corner of the curved stone wall entrance to the cemetery. At a point twenty-five feet from the crossing he would have a nearly clear view up the track to the top of the hill six hundred feet distant, though the track passed through a cut some six or seven feet deep at the deepest point between the cattle-guard and the hill top. In this matter plaintiff is corroborated by the motorman, who says he was looking to see if anyone was at or near the crossing as he approached it and that plaintiff first came into view from behind the stone wall

when the car was at a point about two hundred feet north of the crossing and that plaintiff was then about fifty feet west of the crossing, and that that point was as far west as he could see and that he could not have seen that far west one hundred feet further north. According to plaintiff's evidence he must have been much nearer the track than fifty feet when the motor-man was at the point he says he first saw him and gave the alarm. The jury therefore were justified in finding that plaintiff could not have seen the approaching car, unless it was within two hundred feet of the crossing, till plaintiff was within fifty feet of the same; and that the line of vision extended further north as he came nearer the crossing till at twenty-five feet he had a practically clear view to the top of the hill. The jury were also justified in finding from the respective rates of speed of plaintiff and the car that at the time plaintiff reached the point fifty feet west of the crossing where he could see up the track a distance of some two hundred and fifty feet, that the car was then much further away and was not within his vision. We also think that the jury were justified in finding that if defendant had been giving proper signals at that time that plaintiff would have heard the same and his injury been avoided.

Plaintiff further says that, being somewhat familiar with the crossing and surroundings, he had the crossing in mind and was looking north so as to see any car approaching as soon as he passed the obstructions; that when he was at the point about fifty feet west of the crossing where he could then see about two hundred to two hundred and forty feet up the track, that he then looked and could see no car coming or hear any sounds of an approaching car; that he then looked south and saw a clear track in that direction and was then close to the crossing; that he remembered nothing further until he was in the hospital a day or two later.

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That a railroad is in and of itself a warning of danger and that anyone attempting to cross the same must use his senses—look and listen—to ascertain whether a train is approaching in dangerous proximity, and that the failure to do that is negligence *per se* contributing to any injury received, and that in such case no amount of negligence on the part of the defendant will warrant a recovery, is elementary law. This duty of the traveler to use care to ascertain whether the train is coming or not is wholly independent of the failure of the railroad company to observe any or all duties imposed on it, such as giving signals or running at a reasonable rate of speed. [Sanguinette v. Railroad, 196 Mo. 466, 95 S. W. 386; Hayden v. Railroad, 124 Mo. 566, 28 S. W. 74; Huggart v. Railroad, 134 Mo. 673, 36 S. W. 220; Schmidt v. Railroad, 191 Mo. 215, 90 S. W. 136; Laun v. Railroad, 216 Mo. 563, 116 S. W. 553; McCreery v. Railways Company, 221 Mo. 18, 120 S. W. 24; Farris v. Railroad, 167 Mo. App. 392, 151 S. W. 979; Burge v. Railroad, 224 Mo. 76, 148 S. W. 925; Greene v. Railroad, 192 Mo. 139, 90 S. W. 805; Stotler v. Railroad, 204 Mo. 619, 103 S. W. 1.]

It is said in Porter v. Railroad, 199 Mo. 82, 96, 97 S. W. 880, that: "It is well settled in this State that when a traveler approaches a railroad crossing he must look both ways and listen for coming trains, and the negligence of the company in failing to give proper signals will not excuse the traveler's duty to look and listen. [Fletcher v. Railroad, 64 Mo. 484; Zimmerman v. Railroad, 71 Mo. 476; Baker v. Railroad, 122 Mo. 533; Stepp v. Railroad, 85 Mo. 229; Donohue v. Railroad, 91 Mo. 357; Butts v. Railroad, 98 Mo. 272; Schmidt v. Railroad, 191 Mo. 215.]"

In Mockowick v. Railroad, 196 Mo. 550, 570, 94 S. W. 256, the court said: "(b) It needs no citation of authority to sustain the proposition that there was

an imperative duty resting upon plaintiff to act with reason and common sense and to look out for his own safety when about to cross defendant's track. He was charged with the duty of looking and listening, provided that by looking he could see and by listening he could hear. The law does not excuse those persons of mature years who have eyes and see not and ears and hear not. [Greene v. Railroad, 192 Mo. 131; Schmidt v. Railroad, 191 Mo. 215.] . . . for the negligence of the defendants on the above hypothesis and the negligence of the injured party are concurrent, i. e., coincident in time and place. [See authorities, *supra*; also, Kelsay v. Railroad, 129 Mo. 362; Campbell v. Railroad, 175 Mo. l. c. 183-4; Boyd v. Railroad, 105 Mo. 371; Moore v. Railroad, 175 Mo. l. c. 544, and cases cited; Walker v. Railroad, 193 Mo. 453.]”

In *Kelsay v. Railroad*, 129 Mo. 362, 30 S. W. 339 the court states the law, page 372, as follows: “The duty of a traveler upon a highway in approaching a railroad crossing, to use all reasonable precautions to ascertain the approach of trains and to avoid injury by them is well settled law, not only in this court, but perhaps in all the courts of this country. This rule imperatively requires him to look carefully, in both directions, at a convenient distance from the crossing, before venturing on it, if, by looking, a train could be seen. The duty will not be performed by attempting to look only from a point at which the view is obstructed. The duty is a continuing one until the crossing is reached. If there is a point between the obstruction and the track which gives opportunity to see, it is the duty of the traveler to look. He cannot close his eyes and thereby relieve himself of the consequence of his own negligence. [Hayden v. Railroad, 124 Mo. 566.]”

It is also the law that this duty to use reasonable care to ascertain the approach of a train in dangerous

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proximity is not in all cases at least discharged by a single look made at some distance from the crossing. The duty is a continuous one but depending on circumstances. If there are obstructions the traveler must look after the obstructions are passed and the circumstances might require that he stop to investigate before venturing into danger. If the sight is obstructed then greater care should be given to sound. [Walker v. Railroad, 193 Mo. 453, 92 S. W. 83; Kelsay v. Railroad, 129 Mo. 362, 371, 30 S. W. 339; Cole v. Railroad, 121 Mo. App. 605, 610, 97 S. W. 555.]

Whether plaintiff is guilty of negligence in failing to look and listen at a point nearer the danger zone is somewhat dependent upon his method of travel and other circumstances of the particular case. What would be negligence in this respect by one walking might not be negligence in one riding in a wagon or on a motorcycle. This is true for the reason that a person walking can control his movements and stop much quicker than while riding and having a team or machine to control. As said in Farris v. Railroad, 151 S. W. 979, "This rule is particularly applicable to persons traveling on foot, 'since the danger zone in such a case is so narrow, and it may be avoided with so little effort.' " [See, also, 33 Cyc. 1012.] As the danger zone widens so the looking and listening zone narrows. Nothing was shown in this case as to the distance in which a motorcycle traveling at four or five miles per hour could be stopped, except that plaintiff said he could not stop it within ten and possibly not within twenty feet. We are not prepared to say whether this is true or not.

While it is true that a person approaching a railroad crossing is not permitted to rely on the presumption that the car will be run at a lawful rate of speed and that the timely signals will be given as the car approaches the crossing to the extent that he may neglect his own duty in using care to look and listen

for such cars; yet, the courts do not exact the highest degree of care and watchfulness in this respect. The traveler is only required to use ordinary care in that respect. The point at which the last look for an approaching car was taken may be so far from the actual danger point or the intervening time so great that the failure to look and listen at a nearer point may under the circumstances be declared negligence as a matter of law. Such was the case in Semple v. Railroad, 152 Mo. App. 18, 24, 133 S. W. 114; Cole v. Railway, 121 Mo. App. 605, 97 S. W. 555. On the other hand the point at which plaintiff looked and listened and saw and heard no coming car may be so near the crossing and the circumstances such that plaintiff may rely on the presumption that no car will be run at so high a rate of speed and without any signals being given as to make it dangerous for him to cross the track. He must rely on this at some point. Thus in Woodward v. Railroad, 152 Mo. App. 468, 133 S. W. 677, plaintiff was traveling in a buggy and could not see down the track until she passed a warehouse and was then thirty-five feet from the crossing and could see four hundred feet down the track. She then looked and listened and neither saw nor heard a train. She did not look again, though by doing so nearer the track she could have seen a train at a much further distance. The court said: "The next and most serious question arising from the demurrer to the evidence is that of plaintiff's conduct in going into a position of peril without looking but once in the direction of the train. Some six or seven seconds passed during her progress from the place where she stepped to the point where she passed into the danger zone. . . . A traveler crossing a railroad track must be attentive to his safety from the time he approaches the first danger line until he passes over the last. . . . Having eyes and ears he must use them as a reasonable, careful and prudent man would use

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them, and not trust his safety to others when he is in a position to take care of himself. But of necessity a traveler is compelled to place some reliance on the care of others. Plaintiff knew that the bell should be rung, and also that there was an ordinance limiting the speed of trains to ten miles per hour. She was justified in assuming, from the fact that she could see four hundred feet, and no train was in sight or hearing, that the way was clear and she could cross in safety. It is true she was not absolved from the exercise of constant attentiveness, but she had other places to look and other things to engage her attention that were legitimate and natural subjects of attention."

In *Moore v. Railroad Co.*, 157 Mo. App. 53, 65, 137 S. W. 5, the court said: "There can be no doubt of the proposition pertinent here that plaintiff was not required to anticipate defendant's negligence; but, on the contrary, he enjoyed the right to rely upon its performance of duty. So relying, he was authorized to assume that if a locomotive were in the immediate vicinity, it would both comply with the ordinance by moving forward at a rate not to exceed eight miles per hour and sound the usual signals of approach. . . . Besides, as before stated, he was authorized to assume defendant's locomotive would be sounding a signal if one were near. Having heard no sound, his act of driving forward with the horse under such control as to afford him an opportunity to save it from the collision entirely does not disclose such reckless conduct as would have justified the court in directing a verdict for defendant on the score of contributory negligence. Indeed, where the view of the track is obscured to within a few feet of the rail, as here, one on a highway may presuppose that the operatives of the locomotive are duly careful, and the precepts of ordinary care do not enjoin that he should go forward upon the ground to search out a danger which was ascertainable a few feet beyond by looking and list-

ening, except for the fact that defendant omitted to disclose it through its failure to perform the duties as to signals which the law enjoins."

This proposition is well stated in *Campbell v. St. Louis Railway Co.*, 175 Mo. 161, 172 and 173, 75 S. W. 86, where the court said: "From the facts and circumstances shown by the plaintiff's evidence the conclusion might reasonably be drawn that the deceased was guilty of such negligence, but unless that is the only conclusion that can reasonably be drawn from those facts and circumstances, the demurrer to the evidence was properly overruled. If the evidence was such that there could reasonably be no two opinions about it, then its effect should have been declared by the court as a matter of law, otherwise, it was a question of fact for the jury. [*Gratoit v. Railroad*, 116 Mo. 450; *Weller v. Railroad*, 120 Mo. 635.] . . . It was incumbent on the boy to have used his eyes and ears before driving on the tract, and if all that these witnesses said was true he would have seen or heard the car if he had stopped and looked and listened. Whilst it is the duty of one under such circumstances to look and listen, and sometimes it is the duty to stop in order the better to see and hear, yet it is not always incumbent on him to stop for that purpose; whether he should do so or not in a given case depends on the circumstances, and if it is doubtful the jury are to judge of it." To the same effect are *Maness v. Railroad*, 149 Mo. App. 259, 264, 130 S. W. 87; *Weller v. Railway Co.*, 120 Mo. 635, 651, 23 S. W. 1061, 25 S. W. 532; *Gratiot v. Railway Co.*, 116 Mo. 450, 21 S. W. 1094.

We conclude, therefore, that reasonable men might differ as to plaintiff's negligence under the circumstances of this case; and that there is some evidence to sustain the finding that plaintiff exercised ordinary care for his own safety in approaching and attempting to pass over the crossing; and that the

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court properly refused to direct the verdict for defendant on that ground.

Complaint is also made as to each and all the instructions given and refused. The length of this opinion forbids that the instructions be set out at length and defendant's criticism of each discussed. We have examined them all in the light of defendant's criticisms and find that they properly declare the law. The jury were told in the instructions given that a railroad track is a warning of danger and that every person about to cross the track is bound to look and listen for coming cars before attempting to cross the same; and that a failure to look and listen is negligence and prevents a recovery regardless of defendant's negligence in operating the car; also, that it is the duty of the traveler not only to look and listen before entering upon the track, but if going at a rapid rate of speed to check his speed and to stop if necessary in order to have an opportunity to look and listen, and that a failure to do this would be negligence.

Of those refused, instruction D was properly refused because the court should not declare as a matter of law that it was negligence for plaintiff to fail to stop or check his motorcycle to enable him to see or hear the approaching car, regardless of his speed. [Esler v. Railroad, 109 Mo. App. 580, 83 S. W. 73.] Instruction C as given, required this provided plaintiff was going at a rapid rate of speed or if necessary in order to have an opportunity to look and listen. This was sufficient. Instruction H and I were properly refused because based in part on plaintiff having defective hearing and there was no evidence to support that fact. Instructions J, K and L are based on the humanitarian doctrine as contained in the second count of the petition, but as this count was dismissed that feature of the case disappeared and the jury had nothing to do with it. M was properly re-

fused because no such issue was in the case, and it is not perceived how the facts there stated would necessarily warrant a verdict for defendant. If it is meant thereby to tell the jury that if plaintiff had passed over the defendant's track ahead of the cars to a place of safety and then voluntarily came back into danger he could not recover, it is so unhappily worded as to confuse rather than enlighten the jury on that point. Instructions N and O were properly refused because sufficiently covered by numbers B and C as given. Number T relates to the ringing of the bell and sounding of the whistle eighty rods from the crossing and is disposed of by what we have said in regard to that matter.

It results from these views that the case should be and is affirmed. Robertson, P. J., concurs, *Farrington*, J., dissents on the question of contributory negligence, and files separate opinion holding that this opinion is in conflict with certain decisions of our Supreme Court therein designated. The case is therefore certified to the Supreme Court.

DISSENTING OPINION

FARRINGTON, J.—Suit for personal injuries. Verdict for \$8000. A remittitur of \$501. Judgment for \$7499 against the defendant, which brings its appeal to this court.

There are numerous errors assigned by the appellant, none of which are necessary to consider in this opinion except that based on the refusal of the trial court to give a peremptory instruction which defendant requested on the theory that the case made by all the evidence shows that plaintiff's injuries were the direct result of contributory negligence on his part so palpable as to constitute negligence in law and bar a recovery.

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For the purpose of the discussion of this point, it is deemed necessary to briefly state the facts bearing upon it. Plaintiff, between ten and eleven o'clock in the forenoon, was riding a motorcycle toward the east along a public highway which crossed defendant's double-track interurban electric car line. He had been over this crossing a number of times and was acquainted with the surroundings, but the time in question was the first occasion on which he crossed it on a motorcycle. He was forty-eight years of age, in good physical condition, and possessed of all his faculties and organs of sense except that he was blind in his left eye. The defendant's tracks at this crossing run practically north and south, and the road on which plaintiff was traveling crossed the tracks east and west. There was a public road running north and south on the east side of defendant's tracks, and it was plaintiff's intention to cross the tracks and turn south on this road. The east and west road, after crossing the tracks, diverged north fifty to seventy-five feet before again turning east. Some five or six hundred feet north of the crossing, defendant's track come through a cut. On the west side of the tracks, and on the north side of the road on which plaintiff was traveling toward the crossing, is a cemetery around a part of which is a stone wall four or five feet high, where there were trees and vines and shrubbery, which, according to plaintiff's testimony—and this we must believe for the purpose of the discussion of this question—obstructed the view of the defendant's tracks north of the crossing until the plaintiff reached a point fifty feet west of the crossing. The undisputed testimony is that immediately upon coming out from behind this stone wall of the cemetery plaintiff looked to the north, and testimony offered by the plaintiff goes to show that from this point on the highway the view to the north would not take in more than two hundred of two hundred and thirty or forty feet of defendant's

tracks. While there are some objections that the plat which was offered in evidence did not disclose the condition that existed at the time the collision with reference to foliage and other obstructions, still the plaintiff's witnesses admitted that the plat generally disclosed the true situation. Plaintiff testified that the road he was traveling was down grade toward the railroad crossing until a point was reached about seventy-five or one hundred feet from the tracks where the roadway became level and thus approached the crossing. He stated that for some distance before reaching this level place he had been running at a speed of probably eight or ten miles an hour, but that as he came down the hill to the level place he cut out his spark and coasted to the crossing, and that when he reached a point fifty feet from the tracks where he could look two hundred and thirty or forty feet north and from which point he says he did look (which, by the way, was the only time he looked toward the north), he was going at a speed which he estimated at from four to four and one-half miles an hour, with the power off. He testified that after he glanced toward the north and saw no car approaching, he then glanced toward the south which was entirely open and where the tracks could be seen for a long distance and saw no car approaching from that direction; that having looked in both directions, he was next upon the railroad track and was struck by a southbound car. He was unconscious for several days, and the injuries suffered from the collision were of such a serious nature as to justify his recovery of the amount of the judgment if the defendant is liable.

It is uncontroverted in this case that as plaintiff neared the tracks, after having passed the fifty foot point where he says he looked toward the north, the scope of his vision in that direction up the tracks became wider and longer, and, at a point twenty-five feet from the track on which he was struck, he could have

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seen to the north to the top of the hill or a distance of probably five hundred or six hundred feet, because that brought him far enough east to see beyond the north part of the stone wall and beyond all obstructions to the north—which would enable him to see to the top of the hill.

The testimony as to the rate of speed defendant's car was running is variously estimated at from twenty-five to thirty-five miles an hour; and it will be taken as conceded that defendant in running its car at this place—which was just within the limits of Webb City—much in excess of the rate of speed fixed by the city ordinance, was guilty of negligence. The defendant's car was running seven or eight times as fast as the plaintiff's motorcycle according to plaintiff's own testimony. This being true, it will be readily seen that it would be a physical impossibility for the car, traveling at that rate of speed, to have been within two hundred or two hundred and thirty or forty feet of the crossing when plaintiff glanced toward the north at the point fifty feet from the crossing. It is also a physical certainty that when the plaintiff reached a point twenty-five feet from the track on which he was struck, the car was at a point on defendant's track which was plainly visible to a person looking in that direction; that car at that time must have been within one hundred and fifty to two hundred feet of the crossing, because the speed the car was running, according to plaintiff's testimony, would bring it within that distance. Plaintiff testified that he had never been able to stop his motorecycle within a distance of ten feet; that he probably could stop it within a distance of twenty feet, but didn't know. It will be seen that if he was going at the rate of speed which he says he was, it would have taken him some eight or nine seconds to have covered the distance from the point where he looked north to the point where the collision occurred. It is a mat-

ter of common experience that during this interval of time, a person could causally glance both north and south at least six or seven times. It is a matter of common knowledge that a person on a vehicle such as plaintiff was riding, going at so low a rate of speed—a little faster than a man walks—could in a moment step to the ground, or as quickly turn the machine to the north or south without danger. It is apparent that at a point twenty-five feet from the track, had the plaintiff looked toward the north he would have seen the car approaching, and it is likewise apparent that at that point he was not in a place of danger, but of safety. If he failed to look for the car when it was there and while he was still in a safe place, or if he did look and see it and conclude to attempt to cross ahead of it, or if he did not have his motorcycle under proper control, he is guilty of such negligence, to my way of thinking, as to bar a recovery for the consequences. The law has been declared at numerous times and in no uncertain language that a person approaching a railroad track must exercise ordinary care for his own safety; that a railroad track, in itself, regardless of signals or warnings by those in charge of the cars, is a constant warning of danger; and that although the servants in the operation of the cars on the tracks run them negligently, in violation of law and a city speed ordinance, without giving the statutory warning, still those who attempt to cross the tracks cannot put full reliance on the performance by the railroad company of its duty to properly run its cars, but must look and listen before attempting to cross, and if, by looking and listening, the danger of collision would become apparent and thus be averted by the individual, and this precaution is not taken, the negligence is concurrent, unless the railroad company could by the exercise of ordinary care under the circumstances stop the cars and thus prevent the collision, and the plaintiff is guilty of negli-

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gence *per se*. There is no claim that the humanitarian doctrine applies in this case. It has been often said by the court of highest authority in this state that the duty of looking and listening and of vigilance on the part of those crossing railroad tracks is a continuing one up to the very danger zone. If this be the law, I cannot countenance the judgment in this case, where all the evidence shows that plaintiff looked to the north only once—when he was at a point where he could see but two hundred or two hundred and thirty or forty feet up the track. In other words, if looking where the full view of the tracks could not be had, at a point fifty feet from the crossing, fulfills the obligation which an individual owes himself in going over a railroad crossing, when no semblance of an excuse is offered for not looking again, the opinion of the majority of this court declares the law, but such holding, according to my judgment, is contrary to the law as declared by the Supreme Court of this State. It will be noted that there were no obstructions to the south to attract or impair plaintiff's vision. No one was coming out of the cemetery, or along the road from the east whom he would have to pass. He was on a motorcycle, coasting, with nothing to do but guide it and look and listen and care for his own safety. The record does not disclose one scintilla of evidence affording an excuse for plaintiff's failure to look again to the north. At any place within twenty-five—twenty—fifteen—or ten feet of the track, the car was plainly visible, bearing down upon him, and a mere step to the ground or a turn of the wheel would have placed the plaintiff out of danger; but without doing this, and relying on the glance toward the north when he was some fifty feet from the tracks, the plaintiff went on. It is true, he did not know exactly how many cars came along these tracks nor how often they came, but he did know that cars frequently passed there. The fact that he was blind in his left eye would necessar-

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ily cut off a portion of his vision to the north and require the use of his other eye and his sense of hearing to a greater extent in that direction; and this at a place that required but one glance to the south where the tracks could be seen for a great distance, and where the glance to the north, when made, was obstructed beyond a point a little over two hundred feet distance. As has been said in many decisions, each case must stand on the state of facts therein presented. Probably no two accidents have ever occurred in *exactly* the same way or under the *same* circumstances. I have with great care considered the authorities cited and the argument presented by the respondent, but to my mind the facts of this case present but one conclusion, a conclusion about which there can be no difference of opinion and therefore no question for a jury. Practically all the cases cited and relied upon by the respondent, where the question of negligence was held to have been properly submitted to the jury, had some element in them as disclosed by the opinion which does not exist in the present case. In the Woodward case, 152 Mo. App. 468, 133 S. W. 677, which is particularly relied upon, the evidence is that the injured party looked in the direction from which the train came that injured her and could see four hundred feet, and then looked in the other direction and there saw an engine, an object on which her attention would naturally center and one that would tend to hold her attention and keep her from looking in the other direction again. In other cases cited, it appears, for example, that the headlight on the engine was not burning, or that from some other cause by looking and listening the approach of the train might not be observed. In this case there is no element or circumstance shown to have existed that would distract or tend to hold the plaintiff's attention, no object from which he could expect danger in any other direction, no person approaching to whom he

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owed a duty in operating his machine. All the evidence shows that had he taken the precaution to look when he could have seen and when he was yet in a place of safety he could not have helped seeing the approaching car. Respondent claims that when he looked, at the fifty foot point, where he could see two hundred or two hundred and thirty or forty feet to the north, and saw no car approaching, he could then rely upon the presumption that defendant would properly operate its cars and give the warning, and hence was lulled into a feeling of security in a place of danger. It has been recently reiterated by the Supreme Court that presumptions will suffice where there is no evidence to shed light on the situation, but that presumptions must fade in the light of facts and witnesses who testify and evidence the conditions. This applies equally as well to physical witnesses as to human testimony. Lulled into a feeling of security under the presumption, as he says he was at the fifty foot point, at possibly thirty-five, thirty, and surely twenty-five feet from the track, while he was yet in a place of safety, a witness appeared in plain view which dispelled and put to flight the presumption relied upon at the fifty foot point; that witness was the rapidly approaching car, a menacing, dangerous, warning messenger, telling a reasonably prudent man in plaintiff's position that to then attempt to cross the track meant almost certain destruction, and to know what this witness was saying the plaintiff as a reasonably prudent man had but to glance toward the north from a place of safety. This he failed to do, and for this failure no fact or circumstance or presumption is offered in this entire record as an excuse. Plaintiff's conduct was plainly, unquestionably, negligent. This negligence directly contributed to his injury and was the proximate cause thereof. When he was in a place of safety he could have looked, have seen, and have stopped or turned aside, and thus averted the

collision; he had the last chance to prevent the catastrophe if he had looked, and by failing in that particular he was guilty of contributory negligence as a matter of law, and the peremptory instruction for the defendant should have been given.

In the case of Walker v. Railroad, 193 Mo. 453, l. c. 481, 92 S. W. 83, it appears that the boys did stop and look and listen and that the train was not then in view, and that they went on without again looking in the direction from which the train came; and the court held that where they had traveled fifty feet at a speed a little slower than the plaintiff in this case traveled, such conduct on the part of an adult would bar a recovery as a matter of law.

The majority opinion, in my judgment, is in conflict with the following decisions of the Supreme Court: Walker v. Railroad, 193 Mo. 453, 92 S. W. 83; Strotler v. Railroad, 204 Mo. 619, 103 S. W. 1; Dyrcz v. Railway Co., 238 Mo. 33, 141 S. W. 861; Laun v. Railroad, 216 Mo. 563, 116 S. W. 553; Green v. Railway Co., 192 Mo. 131, 90 S. W. 805; Schmidt v. Railroad, 191 Mo. 215, 90 S. W. 136; Sanguinette v. Railroad, 196 Mo. 467, 95 S. W. 386; Mockowik v. Railroad, 196 Mo. 550, 94 S. W. 256; Porter v. Railroad Co., 199 Mo. 82, 97 S. W. 880; Guyer v. Railway Co., 174 Mo. 344, 73 S. W. 584; Huggart v. Railway Co., 134 Mo. 673, 36 S. W. 220; Hayden v. Railway Co., 124 Mo. 566, 28 S. W. 74. These decisions are founded on reason and are in accord with the decisions of other courts, both state and federal, in similar cases.

Entertaining these views, I respectfully dissent from the opinion of my associates, and under the conditions as they appear to me to exist, it becomes my duty to request that this case be certified to the Supreme Court for final determination.

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LOUIS F. PETERS, appellant, v. L. C. LOHMAN,
G. E. GEISSINGER and CHARLES SCHIF-
FERDECKER, respondents.

Springfield Court of Appeals, May 16, 1913.

1. **FRAUD AND DECEIT: Questions of Fact: Finding of Jury: Binding on Appellate Court.** Where there is evidence sufficient to take to the jury the question as to whether or not certain statements made in a prospectus are untrue, the finding of the jury on that question is binding on the appellate court, providing the instructions submitting the same are proper.
2. **—: Misrepresentations: Liability of Maker.** Where representations are made, professedly not of personal knowledge, but from information obtained from others on which the utterer relied, the utterer may be held liable for misrepresentations where he does not correctly set forth the information he has obtained or where he knows, or has reason to know, that such information is not correct.
3. **—: False Representations: Innocently Made: Action at Law.** Representations, though false, if innocent and made without any intention to defraud and under the belief that they were true, furnish no support to the allegation of fraud and deceit, in an action at law.
4. **CONTRACTS: Fraudulent Representations: Suits at Law: In Equity.** There is a distinction between suits at law for damages and suits in equity for the rescission of the contract. The measures of damage are different and the method of trial and the relief granted differ.
5. **FRAUD: False Representations: "Scienter."** "Scienter," which is a guilty knowledge or a guilty lack of knowledge, is discussed in its relations to actions at law and in equity for false representations, fraud and deceit.
6. **—: Misrepresentations: Essential Elements.** To support a personal action for fraudulent representations, it is not sufficient to show that a party made statements which he did not know to be true and which were in fact false. There must be fraud as distinguished from mistake.
7. **—: Misrepresentations Innocently Made: Not Actionable.** One who has carefully endeavored to learn the truth from appropriate sources and believes that he has learned it, is not liable in an action at law for fraud and deceit.

8. ——: **Corporations: False Prospectus: Liability of Directors.** When directors of a corporation consent to the issuance of a prospectus, stating as facts certain representations therein as to its property, which accord with the facts obtained from trustworthy sources on proper investigation and inquiry and which they honestly believe to be true, they are not liable in an action at law for fraud and deceit, although the representations in fact are false, as guilty knowledge or lack of knowledge cannot be imputed to them.
9. ——: **Actionable Misrepresentations: Evidence Reviewed.** In an action at law against the directors of a corporation for fraud and deceit in the issuance of its prospectus, the evidence is examined and reviewed and held not sufficient to establish plaintiff's contention.
10. ——: **Corporations: Prospectus: Meaning of "Stock Fully Paid and Nonassessable."** A representation in a prospectus that the "stock is fully paid and nonassessable" does not mean that any stock holder has paid full par value for same, but refers to the character of the stock and the liability of the stock holders to the corporation.

Appeal from Jasper County Circuit Court.—*Hon. Carr McNatt, Judge.*

AFFIRMED.

C. H. Montgomery, Hugh Dabbs and R. M. Shepard for appellants.

(1) The defendants in their printed prospectus in the most positive manner, made many false and fraudulent representations, about the corporation and its capital stock. They made them without knowing whether they were true or false and recklessly indifferent as to the injury they might cause. Plaintiff relying on them purchased \$5000 worth of the preferred stock at par; it was worthless when purchased and he lost his money. (2) A party making material statements without knowing whether they were true or false cannot urge as a defense what efforts he made to ascertain the facts and that he acted in good faith. Hamlin v. Abel, 120 Mo. 188. (3) An instruc-

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tion for plaintiff that defendant is liable for representations made without knowledge whether true or false is in hopeless conflict with an instruction for defendant that he is not liable unless he knew the representations to be false. *Brokerage Co. v. Gates*, 190 Mo. 395, and cases cited; *Serrano v. Commission Co.*, 117 Mo. App. 185. That there was no intention to deceive is not a defense. *Leach v. Bond*, 129 Mo. App. 320. (4) The rule is very strict against the directors and officers of a corporation for making statements without knowledge of their truth, and particularly in a prospectus. *Purdy's Beach on Private Corp.*, sec. 263, note I, 264, 265, 266, 266a, *Thompson Liability of Directors of Corp.*, pp. 401-3. (5) The president of a corporation cannot leave its affairs to others and after signing a mortgage containing false representations claim that he only glanced at it and did not know it was false. *Lynch v. Land & Lumber Co.*, 135 Mo. App. 679. (6) Parties interested in a corporation cannot leave its management in the hands of others and then when someone is injured plead their ignorance as a defense. *Hornblower v. Crandall*, 7 Mo. App. 220, [which case went to the Supreme Court and the opinion of the Court of Appeals adopted in 78 Mo. 582.] (7) Instructions must be based on the evidence and it is error to give an instruction not based on the evidence. *Crow v. Railroad*, 212 Mo. 611; *Paddock v. Somes*, 102 Mo. 226. (8) If a defendant has no basis for believing a representation to be true the court ought not to submit that issue to the jury. *Serrano v. Commission Co.*, 117 Mo. App. 202, 203. (9) In a case based upon statements without knowledge of their truth, evidence that they acted in good faith is not admissible. *Dulaney v. Rogers*, 64 Mo. 202; *Hamlin v. Abell*, 120 Mo. 203. (10) Parties acting in a common enterprise the statements of each are admissible against the others, and their agents against

all. Judd v. Walker, 215 Mo. 333-335; Hornblower v. Crandall, 7 Mo. App. 231, affirmed in 78 Mo. 581. Lynch v. Land & Lumber Co., 135 Mo. App. 660; Hellman v. Somerville, 212 Mo. 432; State v. Roberts, 201 Mo. 702. (11) To represent that the stock of a corporation is fully paid when it is not a material misrepresentation. Stone Cutters Co. v. Scott, 157 Mo. 520; Webb v. Rockefeller, 195 Mo. 71. (12) In actions of fraud the courts have always allowed the broadest latitude in the evidence. Mosby v. Com, Co., 91 Mo. App. 500; Sawyn v. Walker, 204 Mo. 160.

Spencer, Grayston & Spencer and Thomas & Hackney for respondents.

(1) The evidence wholly failed to prove any allegation of the petition as to any false statement or representation in the prospectus as the number of acres of land owned by the cement company and as to the number of acres on the plateau. And the evidence wholly failed to prove any falsity in the statement in the prospectus as to the leases on gas and coal lands. (2) There was no evidence of any false statement as to the stock of the company being fully paid and nonassessable stock. The plaintiff recognized this failure of proof on the trial and asked no instruction submitting to the jury the question of fully paid, nonassessable stock as one of the representations relied on. This amounted to an abandonment of that feature of the petition. (3) The only remaining statement in the prospectus of which complaint is made in the petition is this: "That you have an abundance of natural gas, which is the cheapest fuel as yet used in the manufacture of Portland cement, and effects a large saving over the use of coal." The evidence showed that this statement in the prospectus appears only in the signed report of B. B. Lathbury, addressed to the

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Guthrie Mountain Portland Cement Company. Lathbury's opinion thus printed, was given only for what it was worth. Lovelace v. Suter, 93 Mo. App, 438; Brown v. South Joplin Z, & L. Co., 194 Mo. 681. (4) The defendants believed that Lathbury's judgment was good, and invested their own money in the venture on their faith in the correctness of his opinion. Hence, the defendants, having acted in good faith, could not be held responsible in this action for any supposed error of judgment on the part of Lathbury. Lovelace v. Suter, 93 Mo. App, 429; Bank v. Hutton, 224 Mo. 42; Adams v. Barber, 157 Mo. App, 370; Snyder v. Stemmons, 151 Mo. App. 156; Woods v. Letton, 111 Mo. App. 51; Dunn v. White, 63 Mo. 181; Dulaney v. Rogers, 64 Mo. 203; Bank v. Trust Co., 179 Mo. 648; Seranno v. Commission Co., 117 Mo. App. 197; Bank v. Sells, 3 Mo. App. 85; Green v. Worman, 83 Mo. App. 575; Kountze v. Kennedy, 147 N. Y. 124, 29 L. R. A. 360; Hubbell v. Meigs, 50 N. Y. 480; Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep, 551; Oberlander v. Spiess, 45 N. Y. 175; Lord v. Goddard, 13 How. (U. S.) 198, 14 L. C. Ed. 111; Life & Trust Co. v. Life Ins. Co., 148 Fed. 674; Gordon v. Butler, 105 U. S. 553. (5) Under the pleadings the plaintiff was not entitled to recover without showing actual bad faith on the part of the defendants. Seranno v. Commission Co., 117 Mo. App. 197; Lovelace v. Suter, 93 Mo. App. 438; Bank v. Hutton, 224 Mo. 70, 71. Dulaney v. Rogers, 64 Mo. 203; Bank v. Trust Co., 179 Mo. 662. (6) "The representations, though false, if innocent and were made without any intention to defraud and in the belief that they are true, furnish no support to the allegation of fraud and deceit." Green v. Worman, 83 Mo. App. 575; Adams v. Barber, 157 Mo. App. 393; Kountze v. Kennedy, 147 N. Y. 124, 29 L. R. A. 363, 49 Am. St. Rep, 651. (7) The gist of the action is fraud in the defendants, and damage to the plaintiff. Fraud

means an intention to deceive. If there was no such intention, if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue. *Lord v. Goddard*, 13 How. (U. S.) 211, 14 L. C. Ed. 116; *Young v. Covell*, 8 Johns. 23; *Bank v. Sells*, 3 Mo. App. 85, 89; *Life & Trust Co., v. Life Ins. Co.*, 148 Fed. 674.

STATEMENT. Plaintiff instituted this suit against the defendants, alleging that the Guthrie Mountain Portland Cement Company, hereinafter called the company, was a West Virginia corporation organized for the purpose of erecting and operating a cement plant and a brick plant of which defendants were directors; that the capital stock was ten thousand shares of preferred and ten thousand shares of common stock, each of a par value of \$100 per share; that at the time the corporation was formed only a small part of the capital stock was subscribed and paid for and the defendants as directors were chiefly engaged in the sale of said stock.

The action is one for fraud and deceit in making false representations as to the property owned by the company, whereby plaintiff was induced to purchase fifty shares of the preferred and fifty shares of the common stock in said company, for which he paid \$5000. The petition alleges and the evidence shows that soon after plaintiff purchased this stock the company failed, went into bankruptcy and plaintiff's stock proved worthless. Plaintiff sues for \$7500, which he says would be the value of his stock provided the representations made to him by the defendants had been true. Defendants are not accused of making false representations in order to sell stock owned by them individually but in order to sell the unissued stock of the corporation of which they were directors. The representations made by defendants, which plaintiff

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alleges to be false and on which he went to the jury on his own instructions, were made in part orally and in part by a printed prospectus issued by the company by the procurement and with the assent of the defendants as directors. The false representations contained in the printed prospectus on which plaintiff relies for his cause of action are as follows:

“(a) The Guthrie Mountain Portland Cement Company owns 670 acres of raw material deposits, perfectly adapted to the manufacture of a high grade Portland cement, situate near the town of Mapleton, Bourbon county, Kansas.

“(b) In addition to the raw material deposits owned by this company, it also holds perpetual leases on over 2000 acres of natural gas and coal land, lying immediately adjacent to the raw material property.

“(c) This company has contracted with the Goodspeed Gas & Oil Company, whose holdings amount to over 4000 acres of good gas and oil land with a present production of over 35,000,000 cubic feet per day and capable of further development when needed. This company has agreed to furnish gas for fuel to run our entire plant at a cost of three cents per thousand cubic feet, which will bring the fuel cost of manufacture on an equal basis with the plants already in operation in the southern Kansas district where gas is used for fuel.

“(d) Further, should the company elect at any time in the future to use coal for fuel, it is in a position to do so at a much cheaper cost than other plants in the middle west due to the fact that it controls valuable coal lands whose output will be sufficient to run the plant for years to come.

“(f) There were 580 acres on the plateau covered with an upper strata of limestone which varies from sixteen to twenty-one feet in thickness.

"(g) That you have an abundance of natural gas which is the cheapest fuel as yet used in the manufacture of Portland cement and effects a large saving over the use of coal."

It appears, however, that the plaintiff practically abandoned the allegation that the representation contained in paragraph "c" relating to the contract for a supply of natural gas was in fact false.

The oral representations on which plaintiff relied as being made and being untrue were limited to the defendant Schifferdecker, and are as follows:

"(a) That Schifferdecker and Geissinger has each purchased \$40,000 of the preferred stock of said company.

"(b) That said company then held leases on 4000 acres of gas land in the Kansas gas belt near their works near Mapleton, Kansas, and that said company had then developed on said gas leases owned by them, gas wells of a daily capacity of 30,000,000 cubic feet of gas per day.

"(c) That said company had then developed on said land owned by said company at its plant near Mapleton, Kansas, three veins of coal, one of which was cannel coal."

The petition alleges that said statements and representations as made to plaintiff by said directors on behalf of themselves by and through their said prospectus and by certain agents selling stock of the company, "were false and untrue, and that these defendants knew that said statements and representations were false and untrue at the time they were made." Plaintiff further alleged and testified that said stock was of no value at the time he purchased it and that he would not have purchased the same except for the statements and representations so made as aforesaid by and on behalf of said defendants.

The defendants answered separately but each answer is merely a general denial. The trial was had by a jury and resulted in a verdict for the defendants.

The company's property and the proposed brick and cement plants were located in Bourbon county, Kansas. The principal office of the company was at Kansas City. The plaintiff and defendants Schifferdecker and Geissinger all lived at Joplin. The defendant Lohman, who was president of the company during most of the time of this controversy, lived at Jefferson City. None of the defendants were the original organizers or promoters of this company, but each became a stockholder by purchase of stock after its organization. Schifferdecker to the amount of \$30,000, Geissinger, \$15,000, and Lohman, with some personal friends, \$10,000.

The company seems to have been organized with very little, of its stock actually subscribed or paid for. The stock was to be issued as sold. There is no doubt but that for a year or more the directors of this company gave considerable attention to the matter of selling its stock. It was necessary to do this in order to obtain funds with which to build and equip the brick and cement plants and to develop its natural resources. This company seems to have been organized at a time when the cement business was on a boom, resulting in the building of plants throughout the country and much speculation in this line of business. The business of this particular company was one of large possibilities and authorized capital but that was all. The company owned 443 acres of land, which the evidence shows contained large quantities of natural cement and brick material and was located in or near the Kansas natural gas belt. It had a contract with a gas company to supply it with natural gas in large quantities and at a low rate. It appears that the main purpose of the company was to manufacture cement rather than brick and it contemplated building a ce-

ment plant to cost from six to eight hundred thousand dollars, with a daily capacity of two hundred barrels. This plant was never built. The company built and commenced operating its brick plant, connected the same by pipe line with gas wells, built a hotel, a railroad switch and did more or less preliminary work with reference to the cement plant. The evidence shows that the prime factor in the manufacture of cement is an abundance of pure shale and limestone as raw material and a cheap and abundant supply of fuel. The question of water supply, shipping facilities, ability to obtain labor and other matters were of more or less importance. None of the defendants had made more than a cursory examination of the company's property and had no practical or expert knowledge on these questions.

We think the evidence makes it reasonably clear that the company did in fact have an abundance of raw material with which to successfully manufacture cement and brick and; that its chief difficulty was the failure to obtain an abundance of cheap fuel. The defendants' evidence tends to show that this was due to the unexpected and unforeseen failure of the natural gas wells, not an uncommon thing, throughout that district. The defendants' evidence also tends to show that one of the real causes of the financial collapse of the company was due to a sharp decline in the price of manufactured cement, the price going down to about half what it had been in previous years.

The defendants' evidence tends to justify themselves in permitting to be issued the prospectus containing the alleged false representations, and in making any oral representations of like import, on the ground that same were substantially true in fact and that if untrue in any particular such prospectus and oral statements were issued and made in good faith and in accordance with reports and investigations made by reliable experts and other representatives of

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the company, and were based on reliable information obtained by defendants as directors, and which the defendants honestly believed to be true.

A witness, who was the manager of a large and successful cement company, stated that he had examined this company's property with a view of buying it about the time this company failed and that considering the property as a whole, including the location, market, shipping facilities and labor supply, he considered it as good a proposition as he had ever inspected; that limestone and shale were both used in the manufacture of cement and that the extent of the deposit of rock and shale upon the company's land was ample to provide for the operation of the plant for seventy-five to one hundred years, and that same was so located as to afford great natural advantages in working the same. He stated, however, that he did not know as to the fuel supply.

As sustaining their defense, the defendants further showed that the prospectus was not prepared by any of them individually but by another officer of the company on whom they relied as being better acquainted with the facts relating to the company's property and business; and that the prospectus was in part, at least, based on the report and investigation of an expert on natural gas, an expert on raw material for manufacturing cement, and an expert engineer as to the raw material and the way in which it could be handled, manufactured into cement and the product disposed of. The entire prospectus is not in the record but it is shown that to some extent at least the reports of these experts were contained in and referred to in this prospectus. The report of the expert on raw material contains the statement that "you have an abundance of limestone and an immense body of shale of the right kind to make an excellent quality of Portland cement. The choice of your location for the plant is ideal; for fuel you have natural gas or

coal, which ever you prefer; you have water in abundance; for shipping facilities, your property borders on the railroad. Actual tests made with your material prove that you can manufacture a Portland cement equal to any brand. With all these natural advantages you cannot help but make a success of your undertaking."

The report of the expert engineer, after explaining in detail the company's property and advantages for manufacturing cement, stated as follows: "Summing up the advantages possessed by your property, it is well to bring out the following facts: That a Portland cement can be produced by a combination of your limestone and shale under the most favorable conditions; and equal in quality to the highest standard grades of Portland cement; that the extent of the deposits are ample for a plant of a very much larger capacity than you propose erecting; that the physical contours of the property are well fitted for a modern mechanical cement plant with strong features, permitting its economical erection; that you have an abundance of natural gas, which is the cheapest fuel as yet used in the manufacture of Portland cement and effects a large saving over the use of coal; that in case of possible contingency of the decline of natural gas you have local coal with mines not more than one hundred miles away, which insures a bituminous coal at cheaper rates than any of the large mills in the Lehigh regions are paying to day; that you have an abundance of water from the river for all purposes; that the climate conditions are most favorable for operating a plant continuously during the entire year; that the low percentage of rainfall throughout the year will facilitate operation of your quarry and drying of your materials presenting a considerable saving at the end of each year; that the cost of production with a plant of modern equipment, as outlined, should equal per unit

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of production to the performance of any plant in this country."

Defendants' evidence shows that the estimate as to the supply of natural gas was based on tests made by experts in that line of business; that these tests consist chiefly of the pressure shown by the gas wells; that this was the general and perhaps the only method of making estimates for the future supply of gas.

The plaintiff's evidence tends to show that the company's property was never of any substantial value; that the reports and estimates made by these experts were totally unreliable and untrue and that defendants as reasonably prudent men ought not to have believed the same or issued the prospectus setting forth as facts the conclusions and estimates made by such experts. It is especially claimed by plaintiff that the inadequate supply of fuel rendered the company's property of no real value for manufacturing cement however valuable the natural products may have been; that the estimates as to the supply of natural gas were fundamentally wrong in supposing that the pressure shown by the gas wells would continue for an indefinite time notwithstanding the continued flow of gas from such wells. The most that can be said of these contentions is that they presented questions of fact to be decided by the jury, and left the question of defendants' good faith or intentional fraud to be settled the same way.

As to the number of acres of land owned by the company it will be noted that the prospectus stated that the company owned 670 acres of land, while the company in fact only owned 443 acres. The evidence, however, shows that as soon as the prospectus was issued the defendant Lohman noticed this error and had it corrected by pasting in a printed slip designated as "errata," stating that the company only owned 443 acres of land. The plaintiff testified that he did not think there was any such "errata" in the

prospectus which he saw, or if there was he did not read it. This prospectus, however, was not obtained by him directly from the company or any of its representatives, but was obtained from a friend at the suggestion of the company's agent. Whether this correction had been accidentally or purposely removed, or whether a copy of the prospectus had been issued in some manner without the correction being pasted therein is not shown. There is no showing that any copy of the prospectus without this correction was put in circulation by authority or with the knowledge of the defendants. Nor, as stated, was this lack of raw material the cause of plaintiff's loss. It is evident that the jury found such to be the fact. What is here said applies to the limestone acreage also. The record in this case is quite voluminous and there was much evidence introduced by both parties to support their respective contentions. It would serve no useful purpose to set out such evidence in detail, as we think the above statement is sufficient for an understanding of the issues presented.

The instructions given for plaintiff are to the effect that the verdict should be for plaintiff provided the jury find that the plaintiff purchased and paid for the stock in question; that the defendant directors, by themselves or through their manager, for the purpose of inducing plaintiff and others to buy stock from said company, authorized the issuance of the prospectus which plaintiff obtained and examined before he purchased any stock, and that said prospectus contained the representations hereinbefore mentioned; that any or all of said representations were false and fraudulent, and "provided you further find that defendants knew that the above matters were false, or did not know or have knowledge as to whether or not they were true;" that if said defendants, by and through said prospectus, without knowledge of its falsity, did make any of said representations, assuming or intend-

ing to convey the impression that they had actual knowledge of its truth, though conscious that they had no such knowledge, then such representations were just as fraudulent as if they had made them actually knowing that they were false. Similar instructions were given as to the liability of defendant Schifferdecker in making the oral representations attributed to him.

Several instructions were given for defendants, numbered from "A" to "K," inclusive, but we think that instructions "A," "C" and "E" will sufficiently show the theory on which the case was submitted on their behalf, which are as follows:

"A. If the jury find from the evidence that neither of the defendants, Schifferdecker, Geissinger, or Lohman prepared the prospectus read in evidence, but that the same was prepared by some other officer or officers of the Guthrie Mountain Portland Cement Company and if you further find from the evidence that the facts stated in said prospectus were in accord with reports and investigations made by experts or representatives of the said company and were in accord with the information obtained by the defendants, and if you further find that said defendants honestly believed the statements contained in said prospectus were true and did not learn of any misstatements of fact therein (if there were any misstatements of fact therein) prior to the purchase of stock by the plaintiff, then the defendants are not liable for any misrepresentations or statements in said prospectus even though it may have afterwards developed that the same were untrue.

"C. The court instructs the jury that the defendants are not liable in this action for any neglect or failure on their part to make personal investigations to verify the correctness of the statements contained in the prospectus read in evidence, provided that the statements contained therein were in accordance with

the reports to the defendants by other officers of the corporation, and provided the defendants honestly believed the statements contained therein to be true and had no reason to believe that any statements therein contained were false.

"E. Even though the jury may find and believe from the evidence that the defendant, Schifferdecker, made representations or statements to the witness Lambert regarding the character and condition of the property of the Guthrie Mountain Portland Cement Company and even though you may find from the evidence that some one or more of such statements were not true, yet if you further find and believe from the evidence that such statements, if any, were made by the said Schifferddecke in good faith, honestly believing the same to be true, and such belief was based on his own examination and on reports from other persons on which he relied, and that the said Schiefferdecker had no purpose or intent to mislead, deceive or defraud the plaintiff thereby, then the plaintiff cannot recover on account of any of said statements."

The giving of these instructions was excepted to and is assigned as error.

OPINION.

STURGIS, J.—Granting that there is evidence in this case sufficient to take to the jury the question of the statements made in the prospectus being untrue in fact, the finding of the jury on that question would be final and binding on this court, provided the instructions submitting the same are found to be proper. It is therefore apparent that the real question to be determined by this court is the correctness of the instructions given by the court at the instance of defendants in submitting that question to the jury and allowing the defense of good faith and absence of willful fraud.

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The instructions of plaintiff were given as asked, and there is no complaint as to refused instructions; but it is insisted in this court that the instructions given at the instance of defendants are not correct declarations of law as applied to the pleadings and facts in this case and are in conflict with the instructions given for the plaintiff.

On this phase of the case the theory of the defendants' instructions is that, in case the jury find the representations to be false, yet the defendants had a right to justify themselves in making or permitting such statements to be made on the ground that they had a right to rely on information received from reliable sources and on investigation and reports made by the experts as to the quantity and quality of the natural products owned or controlled by the corporation, provided defendants had a right to believe and did honestly believe in the correctness of such reports and representations.

On a preliminary question of pleading the defendants insist that the petition in this case counts only on the proposition that defendants had actual knowledge that the representations in question were not true, and that the court could only submit the case to the jury on this proposition and could not enlarge the issue by the instructions; that it would be a departure from the pleadings to submit the case to the jury on the proposition that the defendants made these representations recklessly and without any knowledge as to their truth or falsity and with a consciousness that they had no such knowledge. Perhaps it is a too narrow construction of the petition to hold that it counts on the actual knowledge of the representations being untrue, while the instructions are based on constructive knowledge of that fact. [Serrano v. Commission Co., 117 Mo. App. 185, 197, 200, 93 S. W. 810.]

Waiving this question of pleading and granting that the allegations of the petition are broad enough to include the issue as to defendants recklessly making representations of which they had no knowledge and under the consciousness that they had no such knowledge, the question remains to be determined whether this issue can be met by proof that the defendants, being without personal knowledge on the subject, relied on information furnished by persons in whom they relied and had a right to rely and made the representations honestly and in accordance with such information obtained from others.

In discussing this question this case must be distinguished from the class of cases where the representations are professedly made, not of personal knowledge, but from information obtained from others on which the utterer relied. Even in this class of cases the utterer may be held liable for misrepresentations where he does not correctly set forth the information obtained by him, or where he knows or has reason to know that the information which he is giving is not correct. [20 Cyc. 31.]

It should be borne in mind also that this is an action at law for fraud and deceit in making these false representations. In this it differs from the case of *Lynch v. Land & Timber Co.*, 135 Mo. App. 672, 679, 117 S. W. 624. It is said in *Kountze v. Kennedy*, 147 N. Y. 124, 29 L. R. A. 363: "The law affords remedies for the consequence of innocent misrepresentation. A contract induced thereby, may, in many cases, be avoided, and the equitable powers of courts are frequently interposed for the rescission of contracts or transactions based upon mistakes or innocent misrepresentation. While the common law action of deceit furnished a remedy for fraud which ought to be preserved, we think it should be kept within its ancient limits, and should not by construction be extended to embrace dealings, which, however unfortu-

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nate they may have proved to one of the parties, were not induced by actual intentional fraud on the part of the other."

In *Greene v. Worman*, 83 Mo. App. 568, 574, which was a suit at law, the court said: "These facts show such fraud *in equity* as would authorize a court to cancel the trade and set aside the conveyance of defendant to plaintiffs on proper terms, but it is not sufficient to prove fraud *in law*; and to have done this, the defendant should have gone farther, and adduced evidence showing or tending to show that Newkirk knew that the representations he made as to the boundary lines and spring were false, or that he made the representations as of his own knowledge, but did not know whether they were true or false, and that plaintiff relied on them believing them to be true. The representations though false, if innocent and were made without any intention to defraud, and under the belief that they were true, furnish no support to the allegation of fraud and deceit. [Walsh v. Morse, 80 Mo. 568; Dulaney et al. v. Rogers et al., 64 Mo. l. c. 203; Joliffe v. Collins, 21 Mo. 338.]" See also *Adams v. Barber*, 157 Mo. App. 370, 388, 130 S. W. 489.

It would seem from these and other authorities that there is a distinction in this respect between suits at law for damages and suits in equity for rescission of the contract. The measure of damages in the two classes of cases would be different and the method of trial and the relief granted would also be different. [*Kendrick v. Ryus*, 225 Mo. 150, 157, 123 S. W. 937, and cases cited.] In this case we are not called upon to say whether the evidence is such that, if plaintiff had brought his suit in equity to rescind the sale, the court might not have granted him some relief, which in this case would have amounted to the return on proper terms of the purchase money.

The case of *Serrano v. Commission Co.*, 117 Mo. App. 185, 93 S. W. 810, is cited and relied on by both

parties and contains an able discussion of the principles applicable to a suit at law for damages. In this case, the court said, at the outset of the opinion (page 194), "That there must be *scienter*, either actual or constructive, in order to support an action at law for deceit, is beyond question." "*Scienter*" in this connection evidently means guilty knowledge, or a guilty lack of knowledge, and implies moral turpitude. The court discusses the three phases of *scienter* as applied to cases of this character; though in that case, as in this one, the court had to do with only two phases. The first phase of *scienter* is said to be: "A false representation made with the knowledge of its falsity by the utterer;" and "proof that the party made the false representation concerning a material fact with knowledge that the representation was false at the time it was made, satisfies the law in so far as *scienter* is concerned."

The second phase of *scienter* is said to be (page 196): "When a party makes a representation of a material fact of his own knowledge when in truth he has no knowledge whatever on the subject either of its truth or falsity."

It is further said in speaking of the first phase of *scienter*, where the parties have actual knowledge that the representation is untrue (page 200): "On this issue it was competent and proper for Mr. Teasdale to show in defense that he had sold the oranges as represented or that he had made such negotiations thereabout as to induce him to believe that he had sold the same and therefore made the representations to that effect in good faith." It is also said (page 197): "It is competent and proper for the defendant to show, in resisting such charge, that he did not know the representation was false and to this end he is permitted to show that he acted in good faith on reasonable appearances and was honestly mistaken, having good reason to believe in the truth of the representation

when made." This case cites Dulaney v. Rogers, 64 Mo. 201, and many other cases upholding this view.

In determining what is guilty lack of knowledge under the second phase of *scienter*, where a party makes a representation as of his own knowledge when in truth he has no knowledge of the subject, the authorities all hold that it is necessary that the utterer have a consciousness that he has no knowledge on the subject; that is, there must be moral turpitude in making the misrepresentation. [Bank v. Hutton, 224 Mo. 42, 65 and 72, 123 S. W. 47.] As said in Serrano v. Commission Co., supra, 198, "Under this phase of the matter, the law being satisfied by proof of the party's reckless or wanton conduct in asserting positively as of his own knowledge a fact concerning which he knew nothing of its truth or falsity, as stated above, raised up and supplies the *scienter* constructively from this reckless conduct on his part."

In the case of Western Cattle Co. v. Gates, 190 Mo. 391, 395, 89 S. W. 382, from which plaintiff's instructions were largely taken, it is said, in commenting on the instructions in that case, page 404: "The theory of the defendant's instruction is that the defendant is not liable unless he actually knew the representations to be false, whereas the theory of the plaintiff's instructions is that the defendant is liable if he made the representations actually knowing them to be false, and also if he made the representations without knowing whether they were true or false, and while conscious that he had no knowledge of their truth but intended to convey the impression to the plaintiff that he had actual knowledge of their truth. One who makes representations which he does not know to be true, and conscious of the fact that he has no knowledge on the subject, to another whom he knows has no knowledge as to the truth or falsity of the representation, is as much guilty of fraud as if he had actual knowledge of the falsity of the statement."

In *Snyder v. Stemmons*, 151 Mo. App. 156, 131 S. W. 724, it will be found that the finding of facts and declarations of law made by the court omitted the proposition "that defendant was conscious of the fact that he had no such knowledge," and that was held to be error. [See also *Paretti v. Rebenack*, 81 Mo. App. 494.]

In Thompson on ~~Liability~~ of Directors, pages 401, 402, it is held that an action at law for damages, the gist of which is *fraudulent intent*, can only be maintained against one who has been guilty of a fraudulent intent. The representations must not only be false in fact but they must have been made with an intent to deceive. "This may be inferred from evidence showing that the party making them knew of their falsity at the time, or at least professed knowledge of their truth, when, in point of fact, he was conscious he had none. But in either case falsehood uttered with intent to deceive is essential. We apprehend that it is not necessary to show that the defendants knew that the representations were untrue, but that it will be sufficient if it be made to appear that they made them with a *fraudulent mind and motive*, intending thereby to deceive and defraud, and *indifferent* as to whether they were true or not." This last statement and quotation is taken from appellant's brief.

When the court says, as they all do, that a party is guilty of actionable fraud when he makes "a representation of a material fact as of his own knowledge when in truth he has no knowledge whatever on the subject" (*Serrano v. Commission Co.*, 117 Mo. App. 185, 196, 93 S. W. 810; *Western Cattle Co. v. Gates*, 190 Mo. 391, 405, 89 S. W. 382), the difficult is in determining what is meant by knowledge. Is the word "knowledge," as here used, to be restricted to purely personal knowledge—what he acquired by the use of his own physical senses only—or is it to be extended

so as to include information obtained from a reliable source? The plaintiff in this case insists that the word is used in its strictest sense of purely personal knowledge; the defendants insist that it should be understood in its broader sense and that a person has knowledge of a fact when he obtains information from a trustworthy source. We think that the contention of defendants in this respect is correct. A man who has received information of a fact from a reliable source and which he has every reason to believe and does believe, cannot, when reporting such to be a fact, have a consciousness that he has no knowledge of the subject. [Bank v. Hutton, 224 Mo. 42, 67, 123 S. W. 47.]

In Dunn v. White, 63 Mo. 181, 185, it is said: "The now generally recognized doctrine is, that in order to support a personal action for fraudulent representations it is not sufficient to show that a party made statements which he did not know to be true, and which were false in fact; there must be fraud as distinguished from mere mistake."

In the case of Lovelace v. Suter, 93 Mo. App. 429, 440, 67 S. W. 737, it is said in a learned opinion by Judge Goode: "The real embarrassment in such disputes arises when the basis of the action is a statement or representation made by the defendant as true of his own knowledge, which he not only believed to be true, *but believed with good reason he knew to be true*; in other words an honest mistake not due to gross negligence. In our judgment, a representation of that kind though it may often make a good case to rescind a sale or *ex contractu* on a warranty, cannot make out a case of deceit for lack of a *scienter*. [Collins v. Evans, 5 Q. B. 804, 13 L. J. Q. B. 180.] Infallible knowledge of facts is never attainable, and it is, or ought to be, enough that one has carefully endeavored to learn the *truth from appropriate sources and believes he has learned it*. Such conduct is very different morally, and we think legally, from recklessly

asserting something to be true from a vague belief of its truth which the speaker has taken no pains to verify; for gross negligence is closely akin to fraud. [Western Bank of Scotland v. Addic, L. R. 1, H. L. 145.]”

The instructions given for the defendants, and which are criticised by plaintiff, we think will be found not subject to criticism and not in conflict with the instructions for plaintiff when rightfully understood and when the word “knowledge” is understood in its broader and legitimate sense. The instructions mentioned do, and we think rightfully, so, exonerate the defendants of making representations, which ultimately turned out to be untrue, on the ground that such representations were in accord with and fairly represented the information obtained by the defendants from experts and other sources on which defendants had a right to rely, and that defendants honestly believed that such representations were correct. When the jury was required to find that these representations were based on and in accord with the information obtained from reliable sources and were honestly believed by the defendants this excludes, and requires the jury to find against, the idea that defendants were conscious that they had no knowledge of the subject.

As shown by Judge GOODE in the case of Lovelace v. Suter, 93 Mo. App. 429, 67 S. W. 737, these views are not in conflict with the cases of Hamlin v. Abell, 120 Mo. 188, 25 S. W. 516; Dunn v. White, 63 Mo. 181; Dulaney v. Rogers, 64 Mo. 201. As there stated: “No such conclusion can be logically drawn from them; for the purpose of the court was not to dispense with the *scienter*, but to point out what may sometimes be *sufficient proof* of it, namely; an affirmation as of one’s own knowledge and not merely his information, opinion or belief, that something material to the business in hand is true, when he has *no good reason* to believe it is true, and is in fact false.”

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In *Bank of Atchison v. Byers*, 139 Mo. 627, 652, 41 S. W. 325, it is said that one of the essential elements of fraud in an action at law for damages based thereon is "knowledge by the person who made it of its falsity." Having consciousness of the falsity of his assertion by one who asserts as a fact a thing which he has no knowledge of is equivalent to having knowledge of its falsity. One or the other, however, must be proved in every case, and the jury must find that it exists in order to make the party liable. [*Snyder v. Stemmons*, 151 Mo. App. 156, 166, 131 S. W. 724, 20 Cyc. 24, 27.]

What is here said with reference to the representations in the prospectus applies also to the alleged oral representations made by defendant Schifferdecker. Like instructions were given as to these oral representations; and the same criticism is leveled at both, which as we have seen is untenable.

What we hold in this case is this; that when the directors of a corporation consent to the issuance of a prospectus, stating as facts certain representations therein as to its property which are in accordance with the facts obtained from trustworthy sources on proper investigation and inquiry, and which they honestly believe to be true, then it cannot be said either that they are making a statement as true about which they have no knowledge, or that they are making such statement with a consciousness that they have no knowledge concerning it.

Special mention might be made of the representations in the prospectus concerning the company's holding perpetual leases on two thousand acres of natural gas and coal lands lying immediately adjacent to the raw material property. The defense to this representation, as to all the others, is that such representation was true, and that, if it was found not to be true, it was made so far as defendants are concerned in good faith from information obtained from reliable

sources and under the honest belief that the same was true. The burden of proof rests upon the plaintiff to show that neither of these defenses exists. The evidence is not very satisfactory as to what leases the company did have on gas and coal lands. Several of the plaintiff's witnesses stated that the company held several such leases. It is not shown, however, how much land was covered by these leases or the location of same or the length of time the leases had to run. None of the leases themselves were put in evidence. We think the evidence fails to show that this representation was not true.

It is true that when defendant Schifferdecker testified at the trial that the company had some leases, it was shown by way of impeaching him that in a previous deposition he had stated that the company had no leases; but it was also shown that this witness, when such deposition was first transcribed, spoke to one of the attorneys for plaintiff claiming that this was a mistake and was advised that same should be corrected. For some cause the deposition was not corrected though it is conceded that the witness promptly noted and advised the opposite party of the mistake. We do not believe that the inadvertent admission of the witness put in evidence only for the purpose of contradiction and impeachment of his positive evidence to the contrary can be taken as supplying the positive proof required of plaintiff that the company had no leases in order to make a case for him.

Complaint is also made that the representation in the prospectus that the stock was fully paid and nonassessable is such a misrepresentation as ought to have been submitted to the jury. We think the court was right in not submitting the question of the truth or falsity of this representation to the jury. This representation clearly refers to the character of the stock and the liability of the stockholders to the corporation. The evidence shows that the stock, when issued and

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paid for by the stockholders, is of the kind properly denominated fully paid and nonassessable. It does not mean and cannot be construed to be a representation that any stockholder has paid full par value for the same; and this is the only complaint made by the plaintiff. This statement applies to both the common and preferred stock. The plaintiff knew that he was not paying par value for his stock, as it is admitted that the common stock was being given as a bonus to the purchasers of the preferred stock. He was not deceived by this representation. It was properly taken by the court and by plaintiff and defendants alike, that when the purchasers paid whatever price was agreed upon in the purchase of the stock, then the stock would be as between him and the company "fully paid and nonassessable."

There are some other errors complained of in the brief, which we have examined and find do not affect the merits of the case. As the case was tried in accordance with the views herein expressed, and the instructions given submitted the facts to the jury on the proper theory, and the jury has resolved the facts against the plaintiff, the judgment should be and is affirmed.

Farrington, J., concurs. *Robertson, P. J.*, concurs, except he expresses no opinion as to the next to the last paragraph, relating to the *representation of the stock* being fully paid and nonassessable, other than that plaintiff was not deceived thereby.

DAVID P. ALLEN, Respondent, v. QUERCUS
LUMBER COMPANY, a Corporation, Appellant.

Springfield Court of Appeals, June 10, 1913.

1. **MASTER AND SERVANT: Fellow-servant's Negligence or Incompetency: Master Liable, When.** In an action by a servant against the master for personal injuries sustained by reason of the alleged incompetency or habitual negligence of a fellow-servant, to render the master liable it must be shown that the servant whose negligence caused the injury was habitually negligent or incompetent; that the injury complained of was caused by the servant's habitual negligence or incompetency; that the fact of the habitual negligence or incompetency of the servant was known, or by the exercise of reasonable care could have been known, to the master and that the master after such actual or constructive knowledge, negligently retained the servant.
2. **—: Injury Sustained and Alleged Incompetency Must be Connected.** To render a master liable for the incompetency or habitual carelessness of a fellow-servant, it should be shown that the particular trait of character making such fellow-servant incompetent, contributed to the particular injury in question.
3. **—: Fellow-Servant's Negligence or Incompetency: Evidence to Establish.** In an action against a master by a servant on account of personal injuries occasioned by the alleged incompetency and habitual negligence of a fellow-servant, it is necessary to prove both that the fellow-servant was "fractious" and high tempered and in such condition was liable to be reckless and rash, and that such fellow-servant was "fractious" and angry at the time the injury occurred.
4. **WITNESSES: Expert Witnesses: Qualifications.** A witness testifying as an expert as to whether or not the engineer who operated the defendant's engine and derrick to hoist and move logs had had sufficient experience should show that he is qualified to speak in relation thereto. But it is not necessary for the witness to have knowledge of that identical engine and appliance provided the engine and appliance, with the working of which he is acquainted, should be so similar that a person having knowledge of the one would necessarily have knowledge of the other.

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5. **EVIDENCE: Expert Witness: Scope of Testimony.** The evidence of expert witnesses concerning the competency or incompetency of the engineer engaged in running defendant's engine for hoisting and moving logs should be confined to what skill and experience is reasonably necessary in running an engine similar to the one in question and operating similar machinery and appliances.
6. **INSTRUCTIONS: Must be Based on Evidence.** An instruction which submits to the jury a question of negligence concerning which there is no evidence, is erroneous.
7. **—: Inconsistent Instructions: Error.** In an action by the servant against the master for injuries occasioned by the alleged negligence of a fellow-servant causing a log to strike and injure plaintiff, instructions *held* to be inconsistent and erroneous, which, on the one hand, told the jury that they might find defendant was guilty of certain acts of negligence and, on the other hand, directed them not to allow the plaintiff any damages resulting from such negligence.
8. **INSTRUCTIONS: Inconsistent Instructions: Error.** Other instructions on the issue of negligence examined and *held* to be so inconsistent and irreconcilable with the instruction on the measure of damages as to constitute reversible error.
9. **MASTER AND SERVANT: Negligence: Contributory Negligence.** In an action against the master by a servant for personal injuries occasioned by the alleged incompetency and habitual negligence of a fellow-servant, the evidence is examined and reviewed. *Held*, that the question of contributory negligence on the part of the plaintiff is not in the case.
10. **PLEADINGS: Negligence: Contributory Negligence.** It is the duty of both plaintiff and defendant in the first instance to plead the facts constituting negligence on the one hand or contributory negligence on the other.
11. **—: Waiving Insufficiency of: Appellate Court Will Not Review Error.** The appellate court will treat the pleadings as sufficient, where the parties to the case try same on the theory that the issue is raised by the pleadings, proceed to trial without filing motion to make more definite and specific and, without objection, allow evidence of negligence or contributory negligence to be admitted.

Appeal from Butler County Circuit Court.—*Hon. J. C. Sheppard*, Judge.

REVERSED AND REMANDED.

Merritt U. Hayden and *Ernest A. Green* for appellant.

(1) The burden was upon the respondent to establish by a preponderance of all the evidence, three facts: First. That Foister was inexperienced, unskillful, habitually careless and incompetent to operate the derrick and engine with reasonable safety to respondent and others employed around same. Second. That appellant either knew of such incapacity, or by the exercise of ordinary care would have known of it. Third. That respondent's injury was the direct and proximate result of such incapacity of said Foister. A failure to prove any one of these three facts deprives respondent of the right to recover herein. Huffman v. Railroad, 78 Mo. 50; Kersey v. Railroad, 79 Mo. 362; Grube v. Railroad, 98 Mo. 330; Adams v. Machine Co., 95 Mo. App. 111; Roblin v. Railroad, 119 Mo. 476; Dysart v. Railroad, 145 Mo. 83; Zumwalt v. Railroad, 35 Mo. App. 661; Tucker v. Telephone Co., 132 Mo. App. 418, 112 S. W. 6; Snodgrass v. Steel Co., 173 Pa. St. 230; Kellogg v. Lumber Co., 125 Mich. 223; Gier v. Railroad, 108 Cal. 129; 1 Labatt on Master and Servant, secs. 181-188; Wharton on Negligence, secs. 238 and 240. (2) Incompetency of a servant on a given occasion may be proved by evidence of prior acts of unskillfulness, or carelessness, or of prior acts indicating incapacity, but the proof must be of such a character as to show habitual carelessness, habitual incapacity rather than occasional acts of negligence. A single act of negligence, prior to an accident, neither proves or tends to prove either inexperience, unskillfulness, habitual carelessness or incompetency. Dysart v. Railroad, 145 Mo. 83; Zumwalt v. Railroad, 35 Mo. App. 661; Tucker v. Telephone Co., 132 Mo. App. 418, 112 S. W. 6; Lee v. Bridge & Iron Works, 62 Mo. 568; Huffman v. Railroad, 78 Mo. 50; McKeever v. Mining Co., 10 S. D. 599, 74 N. W. 1053; Elevator

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Co. v. Neal, 65 Md. 438; Coppins v. Railroad, 122 N. Y. 563-4; Coal Co. v. Seniger, 179 Ill. 373-4; Snodgrass v. Steel Co., 173 Pa. St. 230; Kellogg v. Lumber Co., 125 Mich. 223; Baulec v. Railroad, 59 N. Y. 356. (3) Evidence of many prior acts of negligence on the part of the engineer is not sufficient to sustain the allegation of negligence of appellant without proof of knowledge by appellant, either actual or constructive, of such acts of negligence of the engineer. Tucker v. Telephone Co., 132 Mo. App. 418, 112 S. W. 6; Roblin v. Railroad, 119 Mo. 476; Dysart v. Railroad, 145 Mo. 83; Baulec v. Railroad, 59 N. Y. 356; Huffman v. Railroad, 78 Mo. 50; Zumwalt v. Railroad, 35 Mo. App. 661; Railroad v. Hetzer, 135 Fed. 272. (4) A witness possessing no knowledge either of the method of construction of this engine and derrick or of its mode of operation, who never operated one similar to it in construction and mode of operation, who never saw one operated, who never saw this particular engine and derrick, is not competent to testify, as an expert, with respect to how much experience is required to qualify one as a reasonably careful engineer. McAnany v. Henrici, 238 Mo. 103, 141 S. W. 636. (5) It is error for the trial court to give to the jury instructions that are inconsistent with, and contradictory of, each other for the reason that it is not possible to tell which the jury followed. Smith v. Railroad, 126 Mo. App. 120; Wallack v. Railroad, 123 Mo. App. 160; Gessner v. Railroad, 132 Mo. App. 584

David W. Hill for respondent.

(1) Respondent was entitled to recover when he proved only facts stated in his main instruction. (2) Appellant cannot now be heard to say that respondent's instruction was not supported by the facts, because the instructions offered by the defendant and given to the jury assume the same facts. Peters v.

Gille Co., 133 Mo. App. 412; Reppetoe v. Railroad, 138 Mo. App. 402; Riggs v. Street Railway, 216 Mo. 304. (3) The respondent and appellant adopted the same theory and the appellant in the lower court certainly assumed the facts to exist upon which its instructions were based and it cannot now, in this court on appeal, try the case on any other theory than the one adopted by both parteis in the lower court. Drug Co. v. Bybee, 179 Mo. 369; Farrar v. Railroad, 162 Mo. 469. (4) The respondent had the right to presume that the engineer, Foister, would do his duty and not negligently let a heavy log fall upon him. Tetwiler v. Railroad, 242 Mo. 190; Weighman v. Railroad, 223 Mo. 699; Donohue v. Railroad, 91 Mo. 357. (5) In the trial court, the appellant voluntarily treated the issue of contributory negligence as one for the jury, and it is bound by the position assumed in the lower court. Dahmer v. Street Railway, 136 Mo. Ap. 449. (6) This court will disregard any errors not affecting the merits. Sec. 1850 and 2082, R. S. 1909; Honea v. Railroad, 151 S. W. 119. (7) Upon the hearing of the motion for a new trial, it was for the lower court to decide whether or not the verdict was against the weight of the evidence and the court's finding in favor of the plaintiff in that regard is conclusive in this court. Winfrey v. Lazarus, 148 Mo. App. 388; Lindsey v. Stephens, 229 Mo. 619.

STURGIS, J.—The personal injuries sued for by plaintiff are alleged to have been caused by the inexperience, unskillfulness, habitual carelessness and incompetency of an engineer employed by defendant in operating an engine and derrick used in lifting logs from one place to another in its log yards; and that by reason thereof a log, which was being so lifted in unloading a car of logs, was negligently caused or allowed to strike plaintiff, knocking him down and then let fall on him and dragged across his body perma-

nently injuring him. To avoid the effect of the engineer and plaintiff being fellow-servants the plaintiff also alleged that the inexperience, incompetency and habitual carelessness of the engineer were well known to the defendant or by the exercise of ordinary care could and would have been known to it.

The defendant answered with a general denial, a general allegation of contributory negligence and that when the plaintiff was employed by the defendant he represented and warranted that he possessed the requisite skill to perform the duties of his occupation and that he assumed whatever risks were incident to his employment.

The trial resulted in a judgment in favor of the plaintiff for the sum of \$2000, and an appeal by the defendant.

The situation of the various appliances being used at the time the accident occurred and the surroundings and the circumstances of the accident as disclosed by the testimony are fairly stated by the appellant substantially as follows:

On the west side of the sawmill there was a lumber yard in which the manufactured lumber was piled and on the east side of the mill was the log yard where the logs were gathered and piled preparatory to being hauled up into the mill and sawed. A railroad track extended along the south side of the log yard. This track ran practically east and west. It was laid on a slant, the south side of the roadbed being higher than the north side. The logs were brought to the log yard on flat cars which ran on this track. Usually these logs were fastened on the cars by means of what are called toggle chains, being large chains wrapped around the load and underneath the platform of the car. At a point in the log yard, about one hundred or one hundred and fifty feet north of this track, there was a derrick used for lifting and moving the logs

from place to place. This derrick consisted of an upright piece of timber or mast and another piece of timber called the boom, the latter so placed as to form an angle of about forty-five degrees with the mast or upright timber. An iron cable ran out along and over the upper end of this boom, which was thirty-five or forty feet above the ground, and then extended down from the boom to a block. Below this block were two iron hooks or tongs which would be spread apart and each hooked into either end of a log. The cable was five-eighths of an inch in diameter. This derrick was operated by an engine which was in a little house about twenty-five feet north of the base of the derrick. The proper place for the engineer who operated this engine was in this engine house. The derrick was used to lift logs off of the cars, and to pick them up and swing them around to any desired place in the log yard.

On the morning in question a carload of logs was hauled in on the track and stopped at a point just south of the southwest corner of the log yard, and southwest of the derrick. Employees of the appellant were engaged in rolling the logs off this car. Just a moment before the respondent was injured several logs had been rolled off the car and had dropped down on the bed of the track right beside the car and on the north side thereof, one of them nearly under the wheels, so that it became necessary to move this log before any more were rolled off the car. It was the duty of respondent and another employee to move this log by means of the tongs and derrick. At this time the boom of the derrick was standing about due south of the upright or mast. The upper end of the boom was north and east of where the log lay. The tongs were carried over to the southwest and attached to the log. Respondent hooked the east tong to the east end of the log and another workman fastened the other hook to the west end. At this time plaintiff was the one to

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give the signals for Foister, the engineer, to start and operate the engine. It was customary for the one of the tong hookers doing this to give a slow signal to the engineer indicating a request for him to hoist slowly. The act of hoisting slowly caused the tongs to tighten their grip on the log. After that was done and it was seen that the hooks had firmly caught or gripped the log, another signal was given, known as the "high ball," the purpose of which was to inform the engineer that he should hoist rapidly, or, as some of the witnesses express it, "take the log away" to wherever it was to be taken. On this occasion the plaintiff gave the slow signal and the engineer obeyed this signal. Seeing that the tongs were properly hooked into the ends of the log, plaintiff then gave the "high ball," or signal to "hoist fast," at the same time walking away towards the east in the general direction in which the log would travel as the derrick lifted it. The log was about sixteen feet long and one and a half feet in diameter.

The plaintiff in his testimony says that when he hooked the log he gave the engineer the signal for him to hoist slowly and tighten the hooks and after he saw that this was done he signaled the engineer to pull the log, and that then he walked out east along the car to get out of the way of the log and the loaded car, because he knew that when the log was pulled away from the edge of the rail that it would probably cause the logs to roll off the car.

Witnesses testified that the "high ball" signal does not necessarily mean that the log is to be hoisted rapidly but that the log is then ready to be raised and moved in the usual manner of such work to whatever point it is desired to be moved. The first signal is given the engineer to hoist for the purpose of determining whether or not the hooks have taken effect and securely fastened themselves in the log, and next signal would naturally result in a more rapid movement.

The plaintiff testified that prior to the accident complained of the foreman of the defendant was present when this same engineer was in charge and that they were unloading a car of logs and the engineer, after the hooks had been fastened to a log on the car, was given the signal to hoist and he continued to hoist until the entire car, on account of a chain being fastened around the logs and the car bed, was lifted off of the track and all of the men jumped off the car, and that the foreman then reprimanded him, stating that he would kill somebody directly. Another witness testified that the engineer would get "fractious" part of the time, and on cross-examination explained by saying that when the engineer got mad at somebody he was careless in handling the engine and that "lots of times a person would not hook to suit him or would not hook the right log sometimes, and he would jerk the log from you—something like that." Another witness testified that the foreman was around the place where the engineer was working every day, that the engineer was reckless and that he had seen "him jerk things around there rather recklessly."

The testimony tends to prove that the only experience which the engineer had with work of this character was as an extra man at the defendant's mill, taking the place of the regular engineer when he could not work, for a year or more and that the whole period of his work as regular engineer there would not exceed two or three months.

Plaintiff worked for the defendant some time before the injury, had quit and again began working for the company about six days before the accident, he testified that he told the foreman before he commenced work that he had never hooked before except skidding tongs. The foreman was not introduced as a witness at the trial, neither was the engineer, but two railroad engineers who testified as experts stated that they had not had experience in operating engines

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of similar character to the one used in this instance, but thought that a man should have at least six months experience before undertaking to operate this engine.

The appellant assigns as error here the refusal of the trial court to instruct the jury, as requested by it at the close of the testimony offered in behalf of plaintiff and again at the close of all of the testimony, to return a verdict for the defendant. Error is also assigned on the admission of the testimony of the two railroad engineers, introduced by the plaintiff as experts, for the purpose of showing that the defendant's engineer did not have the required amount of experience to qualify him for this work; also, error is assigned on certain instructions hereinafter discussed.

The essential facts in a cause of action of this character based on the alleged incompetency or habitual negligence of a fellow-servant are (a) that the servant whose negligence causes the injury was habitually negligent or incompetent; (b) that the injury was caused by the servant's habitual negligence or incompetency; (c) that the fact of the habitual negligence or incompetency of the servant was known or by the exercise of reasonable care should have been known by the defendant; (d) and that the master after actual or constructive acquisition of such knowledge negligently retained the servant. [Tucker v. Telephone Co., 132 Mo. App. 418, 112 S. W. 6.]

As a general rule a servant should not be condemned as incompetent by reason of a single act of negligence caused by imperfections that are general to humanity, for all men are more or less negligent; but a single act may under some circumstances characterize an individual as an improper and unfit person for a position of trust or for a particular service, as when such act is intentional and done wantonly, regardless of consequence, or maliciously. The manner in which a specific act is performed may at times

conclusively show the utter incompetency of the party and his inability to perform a particular service. [McDermott v. Hann. & St. Joseph Ry. Co., 87 Mo. 285, 295; Baulec v. New York & Harlem R. R. Co., 59 N. Y. 358, 363.]

But in order to render defendant liable for the incompetency or habitual carelessness of the engineer, it should be shown that the particular trait of character making him incompetent or negligent should be connected with the particular injury in question. [Tucker v. Telephone Co., 132 Mo. App. 418, 427, 112 S. W. 6; Kliefoth v. Iron Co., 74 N. W. (Wis.) 356; Texas Cent. Ry. Co. v. Rowland, 22 S. W. (Texas) 134.] Some of the witnesses stated that the engineer was "fractious," and explained this to mean that he was high tempered and would get mad at the men for not doing things right, and when in this condition he was inclined to be rash and reckless. The same witnesses said that when his temper was not aroused he was careful and did his work well. There is no evidence that he was "fractious" or angry at the time of this accident; consequently there is no evidence that this trait of character in any wise caused the injury. As this is the connecting link between the habitual carelessness or incompetency in this respect of the engineer and this injury, that question cannot be submitted to the jury without supplying this missing link.

In determining whether the defendant's engineer had had sufficient experience in running engines, the witness should be qualified to speak and the evidence of expert witnesses as to this matter should be confined to what skill and experience is reasonably necessary in running an engine similar to this one and operating similar machinery and appliances. We do not mean by this that it should be the same kind of an engine or the same kind of machinery and appliances, but that the engine and appliances should be

so similar and the work so similar that a person having knowledge of the one would necessarily have knowledge of the other. [Meily v. Railroad, 215 Mo. 567, 590, 114 S. W. 1013; Senn v. Railroad, 108 Mo. 142, 151, 18 S. W. 1007; Culbertson v. Railroad, 140 Mo. 35, 59, 36 S. W. 834.]

The evidence as it now appears in this case clearly fails to show that the defendant and its engineer were in anywise negligent in causing the log in question to strike the plaintiff in the first instance. It was the duty of the plaintiff to give the signals to the engineer in regard to starting the engine and to give the "high ball" signal that everything was all right. There is no evidence or claim that the engineer started the engine quicker or raised the log faster or did anything in that regard other than was usual in such cases. The fact that the log in question was behind some other logs, and that in raising the same it skidded on such logs and swung further to the east than was expected, which it seems was the real cause of plaintiff being struck in the first instance, was in no way due to the negligence of the defendant or its engineer. It results that there was no evidence to sustain a finding of negligence as to the log striking the plaintiff in the first instance and this question should not have been submitted to the jury; or what is better, the jury should have been plainly instructed that the defendant was not negligent in this respect.

It follows that the first instruction given on behalf of plaintiff, and which is the only instruction defining defendant's liability and directing a verdict for plaintiff on the conditions therein named, is wrong in that it submits to the jury the question of negligence in the log first striking the plaintiff and authorizes the jury to find that, "said log was then and there unskillfully and carelessly caused by said operator of said engine and derrick, Walker Foister, to suddenly and violently strike plaintiff."

The first instruction given for defendant is a proper one and in effect recognizes this error, but does not cure it. That is an instruction on the measure of damages and tells the jury that, "you cannot, in determining what injuries you will compensate him for, consider such as were inflicted by the log first striking the plaintiff, but only such as were sustained by him by reason of the log being permitted negligently to drop upon him after he had fallen, and then dragged across his body."

It is manifestly inconsistent for the court to allow the jury to find that defendant was negligent in allowing the log to strike plaintiff in the first instance, and then direct the jury not to allow him any damages resulting from such negligent striking. The instruction on the measure of damages, just mentioned as given for defendant, is also in conflict with the instruction given for plaintiff on the same question, in which the court told the jury to allow him damages for any injuries "which you may believe and find were directly caused by the log striking and falling on him." This instruction is erroneous in that it does not exclude injuries resulting from the log striking plaintiff in the first instance as does the instruction given for defendant, as above stated. The instructions upon this phase of the case are so inconsistent upon such a material issue in the case as to constitute reversible error. [Mansur-Tebbetts Imp. Co. v. Ritchie, 143 Mo. 587, 613, 45 S. W. 634; Smith v. Railway Co., 126 Mo. App. 120, 103 S. W. 593; Wallace v. Transit Co., 123 Mo. App. 160, 167, 100 S. W. 496.]

Several instructions given for defendant also relate to the question of defendant's negligence in regard to the log striking plaintiff in the first instance. We will presume that defendant would not have asked these instructions had not the court given the first instruction for the plaintiff submitting this issue to

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the jury. On a retrial of the case, provided the evidence is substantially as it now is, all instructions submitting defendant's negligence in striking plaintiff with the log in the first instance should be omitted, and this phase of the case submitted to the jury solely on the ground of defendant's negligence in allowing the log to fall on plaintiff after he had fallen to the ground.

In view of a retrial of this case, it is also proper to say that it is almost impossible to tell whether or not the log was completely raised off the ground and was stationary or swinging directly under the end of the boom. The evidence shows that when the engineer first started to raise the log it was south and west of the end of the boom. If it was still in that position when it knocked plaintiff down and was not yet directly under the end of the boom, the log would of its own weigh fall to the ground and any attempt to raise the log would result in merely dragging it over the plaintiff. It cannot be determined with certainty whether an effort on the part of the engineer to raise the log higher would have resulted in raising it up so as to swing over the prostrate plaintiff or merely result in dragging it over him. If it was in the latter condition, then it could hardly be said that defendant's engineer was negligent in slacking or stopping the engine. Nor is it clear whether the boom was stationary or was being swung around to the east while the log was being raised and struck plaintiff.

Holding, as we do, that defendant's engineer is not shown to have been guilty of any negligence connected with the log first striking and knocking plaintiff down; and that his negligence, if any, is only connected with letting the log fall on plaintiff after he saw or should have seen him down and helpless, the question of contributory negligence is not in the case; for in that event defendant would owe plaintiff the same duty to avoid injuring him whether his being

knocked down was due partly or wholly to his own carelessness or a pure accident.

Should any question of contributory negligence arise on another trial the pleadings should be made to conform to what is said in Nephler v. Woodward, 200 Mo. 179, 187, 98 S. W. 488, that: "Strictly speaking there is no affirmative plea of contributory negligence in the answer in this case; there is a plea to the effect that whatever injuries the plaintiff may have suffered were the result of her own negligence, but there are no acts of negligence on her part specified in the plea."

It is the duty of both plaintiff and defendant in the first instance to plead the facts constituting negligence on the one hand and contributory negligence on the other. [Harrison v. Railroad, 74 Mo. 364.]

But if plaintiff or defendant is content to try the case on the theory that the general allegation of negligence in the petition or answer is sufficient to raise that issue and go to trial without filing a motion to make same more specific and definite, and allow evidence showing negligence or contributory negligence to go in without objection, then there is nothing for this court to do but to treat the pleadings in the same way. [Harmon v. Railroad, 163 Mo. App. 442, 143 S. W. 114; Schneider v. Railway, 75 Mo. 295; Conrad v. De Montcourt, 138 Mo. 311, 325, 39 S. W. 805.]

We have been asked to reverse this case without remanding the same but we are not certain that all the facts of the case were properly shown on the former trial or that we have correctly understood and interpreted such facts. Under these circumstances the case is reversed and remanded to be retried in accordance with this opinion. All concur.

ROBERT D. BRASHEARS, Respondent, v. UNITED
IRON WORKS COMPANY, Appellant.

Springfield Court of Appeals, June 10, 1913.

1. **CONTRIBUTORY NEGLIGENCE:** Question for Jury Under Proper Instructions. In an action against the master by the servant for personal injuries occasioned by the alleged negligence of the master in not safeguarding certain machinery, where the question of contributory negligence on the part of the servant was properly submitted to the jury under sufficient instructions, the finding of the jury under the evidence relative thereto is binding on the appellate court.
2. **MASTER AND SERVANT: Guards for Machinery; Statutory Provisions Examined.** Sec. 7828, R. S. 1909, requiring the safeguarding of certain machinery held to be effective in an action by the servant against the master on account of personal injuries, without the notice to the master from the State factory inspector to maintain such safeguards, as provided by Sec. 7842, R. S. 1909.
3. **MASTER AND SERVANT: Duty and Liability under Common Law: Under Statutory Provisions.** Duty and liability of master to servant relative to safeguarding certain machinery, considered in the light of the common law and statutory provisions.

Appeal from Greene County Circuit Court.—*Hon. Guy D. Kirby, Judge.*

AFFIRMED.

Mann, Johnson & Todd for appellant.

(1) The court erred in refusing to give defendant's requested instruction in the nature of a demurrer to the evidence offered at the close of plaintiff's evidence in chief, and renewed at the close of all the

evidence in the case, because plaintiff did not prove that any notice had been given to defendant by the State factory inspector or assistant inspector to put guards over the cogwheels on the rattler, which notice is required by Sec. 7842, R. S. 1909, and without which notice Sec. 7828, R. S. 1909, is not operative nor in effect. Therefore, plaintiff's cause of action being based on alleged violation of the provisions of Sec. 7828, plaintiff failed to make out his case and a demurrer should have been given for that reason. *Williams v. Railroad*, 136 S. W. 304. (2) In the absence of statute, the master at common law is not bound to fence or guard his dangerous machinery and no action can be predicated at common law for failure to fence or guard dangerous machinery. *Lore v. Mfg. Co.*, 160 Mo. 622; *Bair v. Heibel*, 103 Mo. App. 632; *Czernicke v. Ehrlich*, 212 Mo. 394; *Cole v. Lead Co.*, 130 Mo. App. 253. (3) The master is not an insurer of the safety of his servant, but is only required to use ordinary care to furnish the servant with reasonably safe machinery and place to work. In this case there was no obligation to put a guard over the machinery. The machine was in good order, there being no defect about it, and all of the evidence shows that the appliance was not unsuitable but was improperly handled by plaintiff. *Winkler v. Basket & Box Co.*, 137 Mo. 394; *George v. St. Louis Mfg. Co.*, 159 Mo. 333; *Holmes v. Bradenbaugh*, 172 Mo. 503. (4) The master has the right under the law to conduct his business in his own way, and there being no inherent defect in that way or manner, the servant knowing that way, cannot recover. In other words, he assumes the risk of any accident resulting from a regular way of doing business. *Coin v. Lounge Co.*, 222 Mo. 488; *Cole v. Jones*, 141 S. W. 689; *Morgan v. Mining Co.*, 141 S. W. 735; *Beckman v. Brewing Assn.*, 98 Mo. App. 555; *Herrington v. Railroad*, 104 Mo. App. 633. (5) Plaintiff got his hand caught in the cogwheels as result of his own careless-

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ness and negligence. Czernicke v. Ehrlich, 212 Mo. 386; Doerr v. Brewing Assn., 176 Mo. 547; Smith v. Box Co., 193 Mo. 715; Sanborne v. Railroad, 10 Pac. 860-863; Stoll v. Hoopes, 14 Atl. 658; Engine Works v. Randall, 50 Am. Rep. 798; Gorman v. Brick Mfg. Co., 68 N. W. 674; Beck v. Firnenich Mfg. Co., 48 N. W. 81; Anderson v. Lumber Co., 69 N. W. 630; Buttle v. Box Co., 56 N. E. 583; Sugar Co. v. Preuner, 75 N. W. 1097; Sakol v. Rickel, 71 N. W. 833; Schultz v. Lumber Co., 65 N. W. 498; Deering v. Canfield & W. Co., 85 N. W. 874; Lewis v. Simpson, 29 Pac. 207. (6) Plaintiff did not allege nor prove that notice by the State factory inspector, or assistant inspector, had been given to defendant to put guards over the cogwheels on the rattler, which notice was required by Sec. 7842, R. S. 1909, and without which notice section 7828 is not operative nor in effect. Therefore, plaintiff's instruction number one was erroneous because it omitted all reference to any such notice and in the condition of the pleadings and proof should not have been given at all. Williams v. Railroad, 135 S. W. 308, et seq.

Patterson & Patterson for respondent.

(1) The court did not err in refusing to sustain defendant's demurrer to the evidence "for the reason that the plaintiff did not prove that the State factory inspector or assistant inspector notified defendant to safeguard the cogwheels on the rattler." First: Because no such point was made in the trial court by the pleadings of defendant, by the evidence, by the demurrer to the evidence or by the motion for a new trial or in any other way. Second: Because the point is without merit any way. (2) The defendant is bound by the theory adopted in the trial court. King v. Railroad, 130 Mo. App. 368; Hof v. Transit Co., 213 Mo. 470; Bray v. Seligman, 75 Mo. 40. (3) An error common to both parties furnishes no ground for a reversal.

Bielman v. Railroad, 50 Mo. App. 151; Waters v. School Dist., 59 Mo. App. 580. (4) A party cannot on appeal or writ of error, complain of an error committed by the trial court which he himself invited or ratified. Gregory v. Sithington, 54 Mo. App. 60; Waller v. Railroad, 59 Mo. App. 410; Harper v. Morse, 114 Mo. 31; Johnson-Brinkman Co. v. Bank, 116 Mo. 558; Drennan v. Dalncourt, 56 Mo. App. 128. (5) A point not presented in the trial court, and not passed on by that court, will not be considered in the appellate court. Burdoni v. Trenton, 116 Mo. 358; Rogers v. Gage, 59 Mo. App. 107. (6) In a statutory action for damages, if there be a failure of proof on the part of plaintiff, the defendant must in his motion for new trial point out the unproven facts, which render the verdict invalid. Lynch v. Railroad, 208 Mo. 1, 42, 44; Fox v. Young, 22 Mo. App. 386. (7) A cause must be disposed of on appeal upon the same theory as that assumed at the trial by the parties. Williams v. Lobban, 206 Mo. 407; St. Louis v. Wright & Co., 210 Mo. 502; Mitchell v. United Railways Co., 125 Mo. App. 11; Bank v. Zook, 133 Mo. App. 603; Brick Co. v. Railroad, 213 Mo. 727. (8) Parties cannot lie by and, trying a case presumingly or apparently on one theory, spring a vital point and endeavor to introduce for the first time in this court an entirely new line of defense. Justice does not lie that way. Nicket v. Railroad, 135 Mo. App. 670, 671. (9) Sec. 7842 was originally enacted in 1891. Every case decided by the appellate courts, and they are many construing this act from Lore v. Mfg. Co., 160 Mo. 608, to Lohmeyer v. Cordage Co., 214 Mo. 685, have held by necessary implication at least that the notice provided for in section 7842 did not in any way affect the defendant's civil liability under section 7828, and there is no case to the contrary. (10) The mere fact that a factory has been inspected is of no significance whatever unless it is proposed to further show in some way some fact of

material importance. McGinnis v. Printing Co., 122 Mo. App. 228; Parker v. Holland, 115 Mo. App. 681. (11) In Missouri an employee does not assume risks incident to the negligence of his employer (Curtis v. McNair, 173 Mo. 270), and for a stronger reason does not assume the risk of working about devices which the employer has not safeguarded as required by statute, even though the employee is aware of their condition. Brannock v. Railroad, 147 Mo. App. 316; McGinnis v. Printing Co., 122 Mo. App. 227. (12) It is only in a case concerning which reasonable men can not fairly differ that the court may declare a plaintiff guilty of contributory negligence as a matter of law. Coombs v. Kirksville, 134 Mo. App. 645, 649; Nagel v. Railroad, 75 Mo. 653; Hulin v. Railroad, 92 Mo. 440.

ROBERTSON, P. J.—Plaintiff sued the defendant in the circuit court of Greene county to recover the sum of \$5000 on account of personal injuries received in the plant of the defendant in Springfield, by reason of getting his left hand caught in an unguarded cogwheel of certain machinery called a "rattler," then being operated by the defendant in its said plant, while placing oil in an oil cup in close proximity to the said cogwheel, and recovered judgment to the amount of \$1602.50. The plaintiff based his petition upon section 7828, Revised Statutes 1909. At the conclusion of the testimony the issues were submitted to the jury under that section of the statute, and also on the question of contributory negligence on the part of the plaintiff.

The case was tried in the circuit court on July 14, 1911. Appellant filed its brief in this court on March 4, 1912, assigning as error the refusal of defendant's requested instruction in the nature of a demurrer to the evidence offered at the close of all of the testimony because, as it is said, the plaintiff did not prove that any notice had been given to the defendant by the

State factory inspector, or his assistant, to put guards over the cogwheels, which notice, it is contended, is essential to put into operation said section 7828. The only other assignment of error contained in appellant's brief is on the giving of plaintiff's instruction numbered one, which alleged error aims at the same point.

Appellant, under the points and authorities in its brief, insists that the accident complained of is the result of the contributory negligence of the plaintiff, but as that is, in this case, a question for the jury upon which they were required to and did pass, under full instructions on the question in behalf of the defendant, it is unnecessary for us to discuss the weight of the evidence.

I am of the opinion that it is not necessary for us to decide whether or not the statute changes the ordinary rule of contributory negligence, because this is a case, I think, in which a court should not hold as a matter of law that the plaintiff was guilty of contributory negligence, irrespective of any statutory provisions providing for the protection of the machinery. The defendant alleges the contributory negligence on the part of plaintiff to be that "he had upon his left hand a pad consisting of an old piece of belting with a slit cut in one end of the same and slipped over his hand and hanging from his left wrist, and that while plaintiff was oiling said rattler he carelessly, negligently and needlessly allowed said pad, dangling from his wrist as aforesaid, to become caught in the cogs of the rattler, drawing it into same and drawing his left hand in after it;" and also that plaintiff could have shut the power off and stopped the rattler and could have removed the pad from his hand. There was testimony tending to prove that the pad was not dangling from plaintiff's left wrist, but that he had it on his hand as used by all of defendant's employees to protect their hands in working with the iron in defend-

ant's plant. The jury and the trial court were shown the size of the pad and how it was adjusted on the hand: Clearly to me on this point the question of contributory negligence was properly submitted to the jury. The proposition of the propriety of removing the pad, so far as can be gathered from the record, or shutting off the power were also, I think, questions for the jury, irrespective of the statute concerning guards. Entertaining these views, I consider any remarks relative to the effect of the statute on the question of contributory negligence outside the questions of law involved here and shall for that reason refrain from a further discussion of that point.

At the time this case was tried, it is evident that the appellant was cognizant of the opinion of the Supreme Court of this State in the case of *Williams v. Railroad*, 233 Mo. 666, 136 S. W. 304, holding that the above section of the statute did not become effective until after notice was given, and the appellant has based its right to reversal by this court principally upon that proposition. However, in the case of *Simpson v. Witte Iron Works Co.*, —S. W.—, the Supreme Court in Banc unanimously overruled the *Williams* case, *supra*, upon the question of notice and held section 7828 effective without the notice mentioned in section 7842. Therefore, it is our duty to affirm the judgment of the circuit court which is accordingly done. *Sturgis, J.*, concurs in separate opinion. *Farrington, J.*, not sitting.

SEPARATE CONCURRING OPINION.

STURGIS, J.—I concur in the result reached in this case. The case of *Simpson v. Witte Iron Works*, —S. W.—, recently decided by our Supreme Court and not yet reported, is decisive on the principal point raised by this appeal. The only other point pressed

for decision is that the evidence conclusively shows that plaintiff is guilty of contributory negligence preventing his recovery in this, that the danger and result of letting plaintiff's hand come so close to the cog-wheels in question as to get caught was apparent and appreciated by plaintiff, and that nothing but inattention, thoughtlessness or absorption in his work could have caused his hand to come in contact with such wheels. This is true regardless of whether the pad on his hand had anything to do with his hand being caught or not. It is apparent that a slightly higher degree of care on his part would have prevented his injury.

If plaintiff's conduct is to be judged by the same standard of what constitutes contributory negligence required prior to and in absence of the statute, section 7828, requiring such machinery to be safely guarded or notice of the danger to be posted, then it would be hard to distinguish this case from the line of cases holding such conduct to be contributory negligence as a matter of law. [Smith v. Box Co., 193 Mo. 715, 92 S. W. 394; Dressie v. Railroad, 145 Mo. App. 163, 129 S. W. 1012; Czernicke v. Ehrlich, 212 Mo. 386, 111 S. W. 14; Sanborn v. Railroad, 10 Pac. (Kan.) 860; Buttle v. Box Company, 56 N. E. (Mass.) 583.]

While it is held in Huss v. Bakery Co., 210 Mo. 44, 54, 108 S. W. 63; Dressie v. Railroad, *supra*; Mill-sap v. Beggs, 122 Mo. App. 1, 7 and 11, 97 S. W. 956, that plaintiff may be guilty of such contributory negligence as bars a recovery even in cases where by statute the machinery should be, but is not guarded, yet I do not understand such cases to hold that plaintiff's conduct as bearing on contributory negligence is to be measured by the same standard of care or, more accurately, that such standard rests on the same basis in cases covered by the statute as it would be if such statute did not exist. In the case last cited, the court, in speaking of the provision of the statute requiring notices of the danger to be posted in case the machin-

ery cannot be guarded, said: "The notice was intended to operate as a continuous reminder of the danger. Otherwise, it could be posted for a day and then torn down. The statute, recognizing that trait in human nature to become inattentive to danger by constant presence with it, required this continuous notice as a protection against what might, *in ordinary respects*, be termed the servant's carelessness. We, of course, do not say that the servant could not be so careless as to cause him to lose his right to hold the master liable for injury where no notice was posted. As already stated, he could be guilty of such negligence in some circumstances, as would deprive him of a right of action. But we do hold that *in all cases the statute must be allowed to count for something*, and to that end it should enter into consideration in determining whether there was culpability on the servant's part. If the servant's fault is to be determined by the *usual rules* applicable where there is no statute, then the enactment of the statute was well-nigh useless. The true question in such cases is: Would the servant have acted in the careless manner he did act if the reminding notice required by the law had been conspicuously before him? Or, stated in another way, should his conduct, in the circumstances, be denominated careless conduct? The notice, as already intimated, is required in recognition of a failing in human nature, and not being posted, one is apt to become unmindful of a danger which a constant warning might have caused him to avoid."

Suppose the case, as here, is one where guards can be placed and the defendant is required to guard the machinery rather than post the notices. What then takes the place of the "continuous notice as a protection against what might, in ordinary respects, be termed the servant's carelessness," or the "constant warning in recognition of a failing in human nature?" Certainly the servant is not held to the use of a higher

degree of care where there should be, but are not, guards than he is where there should be, but is not, a posted notice. The same statute, having the same purpose, covers both contingencies. If the statute in the one case, where notices should be posted and are not, recognizes and excuses this weakness of human nature in becoming inattentive to danger by reason of its constant presence, then it also recognizes and excuses this weakness where guards should be placed and are not.

The purpose and effect of this statute in modifying the rule of contributory negligence in cases covered by it by adding a new element to be considered is pointed out in the able dissenting opinion of Woodson, J., in Huss v. Bakery Co., *supra*, and while his remarks were held not applicable to the particular facts and instruction under discussion in that case, I think the law is there correctly stated and is applicable to this case as follows (page 72): "This instruction of defendant is based upon the theory that the common law prescribed the standard of duty the defendant owed the plaintiff in this case. That is not the law. Section 6433 prescribed a much higher degree of duty to be exercised by defendant towards the plaintiff than did the common law. Under the common law the defendant was required to furnish plaintiff only a reasonably safe place in which to work and reasonably safe means with which to perform his duties, while the statutes require the defendant to safely and securely guard the gearing when possible; and, if impossible, then to conspicuously post a notice calling attention to the dangers. As a corollary to that *increased* duty of defendant, the care of the plaintiff was correspondingly *decreased* and the jury should have been told so in no uncertain words."

This proposition of law also finds recognition in the latest decision of the Supreme Court, Simpson v. Witte Iron Works, *supra*, where it is said: "We think, therefore, that the lawmakers in conditioning the duty

to guard upon the phrase quoted meant thereby that it should attach when the ‘belting, etc.,’ should be so placed in a factory that its normal operation would injure any employee who should approach near enough to be caught by its force or subjected to its activity. Such accidents are likely to happen to employees who are *engrossed in work* near such machines unless they are protected from the workings of the machinery by safe and secure guards. This thought is expressed with clearness, force and completeness by WOODSON, J., in the dissenting opinion of Huss v. Bakery Co., 210 Mo. l. c. 67 and 68, to-wit: ‘The Legislature knew that the human mind and conduct was such that a servant when in the performance of his duties to his master, surrounded by dangerous machinery, in motion, with his mind concentrated upon his work, oblivious to his surroundings, is liable to slip or take a misstep and fall into the revolving machinery, or *thoughtlessly thrust his hand* or other portion of his body into the gearing or other portion of the machinery; and if not ‘safely and securely guarded,’ he would in consequence thereof receive injuries of a serious character.’ ”

This case is therefore to be distinguished from the line of cases cited by appellant holding that the servant in somewhat similar circumstances, but where the statute did not apply, was guilty of contributory negligence as a matter of law; and the trial court did right in not directing a verdict for defendant on that ground.

CASES DETERMINED
BY THE
ST. LOUIS, KANSAS CITY AND SPRINGFIELD
COURTS OF APPEALS

AT THE
OCTOBER TERM, 1912.

LIBBIE BRIX, Respondent, v. AMERICAN FIDELITY COMPANY OF MONTPELIER, VERMONT, Appellant.

St. Louis Court of Appeals, February 4, 1913.

1. **APPELLATE PRACTICE: Conclusiveness of Judgment.** In a case tried to the court, where no declarations of law were asked or given, a judgment for plaintiff will not be reversed if it can be sustained under any view of the evidence and reasonable inference therefrom.
2. **ACCIDENT INSURANCE: Notice of Injury: Waiver.** Where early notice of injury was not given, as required by an accident insurance policy, and the insurer's general agent denied all liability when notice was served, but its adjuster called on insured and discussed a settlement, and later sent a check in the form of a receipt in full, which insured rejected, and afterwards its physician examined insured, and it finally rejected the claim, resting its refusal on the assertion that insured was suffering from malaria, and not from injury, the requirement of early notice was waived; the purpose of such requirement being, to advise insurer of the probable claim to be presented and to afford it an opportunity to investigate the same.
3. _____: _____: **Effect of Failure to Give.** At most, the failure of an insured to give early notice of an accident, as required

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by an accident insurance policy, merely authorizes the insurer to declare a forfeiture of the claim for that cause.

4. ____: ____: ____: Waiver. The requirement in an accident insurance policy that insured give insurer early notice of an accident is for the benefit of insurer and can be waived by it.
5. **WAIVER: Definition.** A waiver is the intentional abandonment or relinquishment of a known right, and the intention to do so is the essential element involved.
6. **ACCIDENT INSURANCE: Notice of Injury: Waiver.** A waiver once attached cannot be thereafter recalled, and hence where the conduct of an insurer amounted to a waiver of a requirement of early notice of injury under an accident policy, it could not thereafter recall the waiver and declare a forfeiture.
7. ____: **Amount of Recovery: Right of Court to Fix.** A provision in an accident insurance policy that, for partial disability, an amount, to be determined by insurer, within certain maximum and minimum limits, shall be paid insured, gives insurer the right to determine, in the first instance, the amount to be paid; but if insurer refuses to perform this function, it is competent for the court to do it.
8. ____: ____: _____. In an action on an accident insurance policy, which provided that, for partial disability, an amount, to be determined by insurer, within certain maximum and minimum limits, shall be paid insured, where insurer denied any liability, *held* that the court was justified, under the evidence, in awarding insured the maximum amount.
9. **MARRIED WOMEN: Right of Recovery: Accident Insurance.** Sec. 8304, R. S. 1909, declaring that a married woman shall be deemed a *femme sole* and may contract and sue and be sued to enforce such contracts, does not suggest that a married woman must be engaged in some business before she is entitled to recover on contracts assuring a right to her, and hence a recovery by a married woman on an accident insurance policy cannot be defeated on the ground that, she not being in business, her husband alone is entitled to her services and alone entitled to recover therefor.
10. ____: ____: ____: **Estoppel.** An insurance company which issues an accident insurance policy and accepts premiums from a married woman is estopped to dispute its obligation to her for her loss of time, upon an accident occurring, on the ground that, inasmuch as she was not engaged in business, her husband alone was entitled to recover for her loss of time.

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Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

AFFIRMED.

Igoe & Carroll and *Wm. R. Gilbert* for appellant.

(1) There could be no loss by plaintiff because she was living with her husband, keeping house, doing no other work; her services belonged to him and if incapacitated the loss was his, not hers; no insurable interest in the plaintiff was shown. *Wallis v. Westport*, 82 Mo. App. 527; *Elliott v. K. C.*, 210 Mo. 576; *Perrigo v. St. Louis*, 185 Mo. 285. (2) There is no proof that plaintiff paid or became obliged to pay physicians' fees, yet she was allowed \$7.50 for this item. A married woman can recover for medical attention only when she has agreed to be responsible, or has paid, therefor. *Engleman v. Railroad*, 133 Mo. App. 514; *Tinkle v. Railroad*, 212 Mo. 445. (3) The failure to give notice precludes any claim. *Myers v. Maryland Co.*, 123 Mo. App. 682; *Burgess v. Ins. Co.*, 114 Mo. App. 169; *Burnham v. Ins. Co.*, 75 Mo. App. 399; *La Force v. Williams City Co.*, 43 Mo. App. 528; *Michigan Ass'n v. Missouri Co.*, 73 Mo. App. 161; *Crotty v. Casualty Co.*, 146 S. W. 835; *McFarland v. Ass'n*, 124 Mo. 215; *Woodall v. Fidelity Co.*, 131 Ga. 517; *Foster v. Fidelity Co.*, 99 Wis. 847; *Travelers Ins. Co. v. Myers*, 62 Ohio St. 529; *Barclay v. London Co.*, 105 Pac. 865; *Caldwell v. Ins. Co.*, 139 S. W. 704; *Woolverton v. Fidelity Co.*, 190 N. Y. 41; *Woodall v. Fidelity Co.*, 131 Ga. 517; *Craig v. Co.*, 80 S. C. 151; *Hatch v. Casualty Co.*, 83 N. E. 398

Frederick A. Mayhall for respondent.

(1) Notice is a question of knowledge and is one of fact for the jury. *Osborn v. Wood*, 125 Mo. App. 250; What is a "reasonable time" is ordinarily a

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mixed question of law and fact. *Smoke Prevention Co. v. St. Louis*, 205 Mo. 220; *Paul v. Trust Co.*, 125 Mo. App. 483; *Turner v. Snyder*, 135 Mo. App. 320; *Althoff v. Transit Co.*, 204 Mo. 166; *Davis v. Thompson*, 134 Mo. App. 13; *Springfield v. Schmook*, 120 Mo. App. 41. (2) In Missouri, the wife is emancipated from her common law disabilities, and is capable of contracting, the same as though she were a *femme sole*. R. S. 1899, sec. 4340; R. S. 1909, sec. 8304, 1735; *Huss v. Culver*, 70 Mo. App. 514; *Womach v. St. Joseph*, 201 Mo. 467; *Elliott v. Kansas City*, 210 Mo. 576; *Cullar v. Railroad*, 84 Mo. App. 347. (3) The appellant is estopped to deny liability under its own contract after accepting premiums from respondent, and ratifying the acts of its agent. *Berger's Appeal*, 15 Norris (Pa.), 443; *Andrews v. Life Ins. Co.*, 92 N. Y. 596; *Woodward v. Harlow*, 28 Vt. 338; *Reed v. Latham*, 40 Conn. 452; *Stecker v. Smith*, 46 Mich. 14; *Dunn v. Railroad*, 43 Conn. 434; *Schenck v. Sautter*, 73 Mo. 46; *Jones v. Atkinson*, 68 Ala. 167; *Bailey v. King*, 41 Conn. 365; *Eberts v. Selover*, 44 Mich. 519; *Tasker v. Kenton Ins. Co.*, 59 N. H. 438; *Crans v. Hunter*, 28 N. Y. 389; *Hall Mfg. Co. v. R. R. Sup. Co.*, 48 Mich. 331; *Miller v. McManus*, 57 Ill. 126; *Helens v. Turner*, 36 Ark. 577; *Hooker v. Hubbard*, 102 Mass. 439.

NORTONI, J.—This is a suit on a policy of accident insurance. Plaintiff recovered and defendant prosecutes the appeal. On agreement of the parties, the case was tried before the court without a jury.

The principal question for review here relates to the matter of the court's giving judgment for plaintiff though it appeared notice of the accident was not given to defendant within a reasonable time as required by the policy. By the policy of insurance, defendant agreed "to indemnify the insured, Mrs. Libbie Brix, against bodily injury caused solely by external,

violent and accidental means while this policy is in force." By another provision of the policy, the insured agreed that "notice in writing shall be given to the company at its home office or to the agent by whom this policy has been countersigned, as early as may be reasonably possible, of the event of any accident."

The insured plaintiff, a married woman, together with her husband and baby, was sojourning at Briggsville in Wisconsin at the time of the accident, on a pleasure trip, during the summer vacation. At that place, on August 12, 1909, plaintiff met with an accident while in the act of alighting from a buggy. In some manner her skirts became entangled and she was thrown with great force against the wheel of the vehicle and thus received an injury to her side immediately over the liver. It appears she was forthwith seized with great pain, and suffered therefrom for several weeks thereafter. Plaintiff's suffering was such as to occasion her to terminate her vacation at that place, and she and her husband went to Chicago on August 15, where they remained three or four days visiting her aunt. During the time at Chicago, plaintiff was confined to the house, and though not in bed, she lounged upon the couch and continued to suffer as before. Instead of returning to her home in St. Louis, about August 20th plaintiff and her husband went to Kimmswick, Missouri, to visit with plaintiff's mother while she recuperated. She remained at Kimmswick with her mother for several weeks and while there was under the care of a physician. Finally, about September 5th, she with her husband returned to her home in St. Louis and continued under the care of a physician here for several weeks.

The evidence tends to prove that plaintiff suffered an injury to her liver through the fall above mentioned and that internal hemorrhages resulted therefrom. It appears that plaintiff was totally disabled as a result of the accident and confined to her

bed practically all of the time for ten weeks after its date on August 12th, and was for six weeks thereafter partially disabled. The policy vouchsafes indemnity for such injuries at the rate of \$7.50 per week for total disability and for partial disability "a sum to be determined by the company but not less than twenty-five per cent nor greater than seventy-five per cent of the weekly indemnity above specified, depending upon the extent of the disability." By another provision of the policy, the company agreed to pay an amount equal to one week's indemnity—that is, \$7.50—to recompense a physician or surgeon, provided one is required.

By its finding and judgment, the court allowed plaintiff ten weeks' full indemnity for the time she was confined to her bed at \$7.50 per week, and the amount of \$7.50—that is, an amount equal to one week's indemnity—to compensate the physician; and, furthermore, indemnity at the rate of \$5.61 per week for the period of six weeks during the time she was partially disabled.

Though, as before stated, the policy required plaintiff to give the company notice of the accident as early as may be reasonably possible after the occurrence, no notice whatever was given until September 20, 1909, or nearly six weeks after the injury was received. It is said the reason notice was not given was because plaintiff did not have the policy with her. It was at her home in St. Louis and it was intended that no claim would be made unless it developed the injury was more severe than first thought. When notice of the accident was finally delivered to defendant's general agent, he denied liability at once on the ground that the notice had been deferred an unreasonable time. Because of this, it is urged the judgment may not be sustained, for it is said the requirement of the policy as to such notice is a condition precedent to the right of recovery. For the purposes of the case,

the proposition thus advanced may be conceded to be true and the judgment sustained, notwithstanding, in view of the evidence tending to show a waiver. As before stated, the cause was tried before the court without a jury and no instructions were asked or given. In such circumstances, though we are not advised as to the views of the trial court or the theory of law it pursued in giving the judgment for plaintiff, such judgment should not be reversed if it may be sustained on any view of the evidence, and this includes, too, all reasonable inferences therefrom in favor of plaintiff's case.

No one can doubt that the purpose of the notice required by this provision of the policy is to advise defendant of the probable claim to be presented and afford it an opportunity for investigation thereabout. It appears that though defendant's general agent denied all liability on the policy at the time the notice was served, September 20, it nevertheless sent its adjuster, Mr. Carroll, to investigate and settle the claim a few weeks thereafter. In the latter part of October, defendant's adjuster called upon plaintiff and her husband at their residence in St. Louis and talked over the matter of settlement. In the meantime, plaintiff had submitted to defendant a proof of loss in due form and demanded \$67.50 to cover indemnity then accrued. This demand included eight weeks for total disability and \$7.50 to compensate her physician. This claim the adjuster agreed to pay and on the following day transmitted to plaintiff the company's check for that amount in a letter in which he said, "I am enclosing herewith American Fidelity draft No. A-1162 for \$67.50. This is for the full amount claimed in your proof of loss." However, attached to the check, and which it was necessary for plaintiff to sign, was a receipt "in full and final settlement and satisfaction of all claims, etc." Because of this receipt requiring an acknowledgment as for full and final settlement

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and satisfaction, plaintiff declined to accept the check and returned it to defendant. Under the policy, it was competent for her to make different claims for indemnity if her disability continued, and she declined to make final settlement at the time. According to the evidence and the finding of the court, no proposition of compromise whatever was under consideration between the parties at the time, but, on the contrary, plaintiff was making a claim for indemnity then due, and defendant agreed to pay it, but, in addition and supplemental to the conversation between the adjuster and plaintiff and her husband, interjected a receipt for her signature, stipulating a full release. A few days later defendant sent its physician to examine plaintiff, which he did, and it finally rejected the claim entirely and refused to pay it. It was certainly competent for the court to find from these facts and this conduct of defendant's adjuster that it waived the matter of notice under the policy, for though the general agent at first laid stress on that matter, the company afterwards, through its adjuster, proceeded as though the failure to give notice was wholly immaterial and actually agreed to settle the claim for the amount demanded at the time without any reservation whatever. Finally defendant rested its refusal to pay upon the assertion that plaintiff was suffering from malaria and had not been injured at all. At most, the failure to give the notice authorized defendant to declare a forfeiture of the claim under the policy for that cause. The provision as to such forfeiture was for defendant's benefit and could be waived by it if it saw fit to do so. Defendant knew its rights in the premises and it first asserted them to the effect above stated. A waiver is the intentional abandonment or relinquishment of a known right, and the intention to do so is the essential element involved. [Francis v. A. O. U. W., 150 Mo. App. 347, 130 S. W. 500.] Obviously the court was authorized to find from the facts

above set forth that defendant intended to and did waive the right of forfeiture on the ground that notice was not given within a reasonable time, for this matter seems to have been abandoned entirely by the adjuster. A waiver once attached may not be thereafter recalled. [Bell v. Mo. State Life Ins. Co., 166 Mo. App. 390, 149 S. W. 33.] There is an abundance in the evidence to support the finding on the grounds of a waiver. [See Myers v. Casualty Co., 123 Mo. App. 682, 101 S. W. 124; Krenshaw v. Pac. etc. Life Ins. Co., 63 Mo. App. 678.]

It is argued the court should not have allowed plaintiff \$5.61 per week for the six weeks she was partially disabled, for the reason the policy does not authorize it. The provision of the policy touching the matter of partial disability vouchsafes that the company will pay therefor "a sum to be determined by the company not less than twenty-five per cent nor greater than seventy-five per cent of the weekly indemnity above specified depending upon the extent of the disability." By its finding and judgment, the court allowed plaintiff seventy-five per cent of the weekly indemnity, that is, seventy-five per cent of \$7.50 for each week of partial disability, and we entertain no doubt that it was competent for it to do so, for by the very terms of the policy the matter depended upon the extent of the disability. Of course the matter was for the company to determine in the first instance, but if the company refused to determine it, as it did, then the only competent tribunal to do so was the court, and this it did on ample evidence.

It appears plaintiff is a married lady and has no business calling or avocation, other than that of the usual housewife. Because of this it is urged she was entitled to recover no indemnity whatever, for, it is said, the services of a housewife belong to her husband and he alone may recover for the loss. The doc-

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trine is frequently adverted to and applied in tort cases where the suit is for damages resulting from a personal injury to the wife sufficient to disqualify her from performing the usual household duties as will appear by reference to *Wallis v. Westport*, 82 Mo. 522. However, it is wholly besides the instant case, for, here, the suit is on defendant's covenant to "indemnify the insured, Mrs. Libbie Brix, against bodily injury" and the whole purport of the policy reveals that defendant undertook to compensate plaintiff for disabilities she might suffer from accidental cause without regard to whom her services belonged at the time. Under our statute (Sec. 8304, R. S. 1909), it is declared a married woman shall be deemed a *femme sole* so as to enable her to contract and be contracted with, to sue and be sued and to enforce such contracts as she may make. There is nothing in the statute suggesting that a married woman may not recover on contracts assuring a right to her, even though she is not engaged in some business, and the argument to that effect is entirely without merit. [*Huss v. Culver*, 70 Mo. App. 514.] After accepting the premiums and entering into the covenant to indemnify plaintiff for disabilities occasioned from bodily injury caused by accident, it is not competent for defendant to dispute its obligation to pay, where the accident, the injury and loss of time appear, for the principle of estoppel intervenes and precludes it.

We have examined the other points presented in the brief but regard them unworthy of discussion in the opinion. They are, therefore, overruled. The judgment should be affirmed. It is so ordered. *Reynolds*, *P. J.*, and *Allen*, *J.*, concur.

AGNES KETTLEHAKE, Respondent, v. AMERICAN CAR & FOUNDRY COMPANY, Appellant.

St. Louis Court of Appeals, February 4, 1913.

1. **APPELLATE PRACTICE:** Trial Practice: Demurrer to Evidence: Review. The propriety of overruling a demurrer to the evidence is to be determined on a consideration of the evidence introduced by plaintiff.
2. **MASTER AND SERVANT:** Action for Death of Car Repairer: Sufficiency of Evidence. In an action for the death of a car repairer, who, while working under a car being built by defendant, was run over by reason of a train of cars operated by defendant striking the car under which he was working, evidence that no warning was given him of the approaching train held sufficient to take the case to the jury on the question of defendant's negligence.
3. **APPELLATE PRACTICE:** Conclusiveness of Verdict. A verdict rendered on conflicting evidence is conclusive on appeal.
4. ——: Trial Practice: Sufficiency of Objection to Evidence. An objection to the introduction of evidence on the ground it is immaterial is too general to constitute a foundation for an assignment of error.
5. **TRIAL PRACTICE:** Appellate Practice: Objection to Line of Evidence. Where an objection to evidence is made and an exception is saved to the overruling of the objection, it is unnecessary to object to the same character of testimony subsequently introduced.
6. **DEATH BY WRONGFUL ACT:** Evidence: Financial Condition of Widow. In an action by a widow for the death of her husband, under Sec. 5425, R. S. 1909, evidence that plaintiff had no other means of support than her husband is admissible.
7. ——: Measure of Damages: Instructions. In an action by a widow for the death of her husband, under Sec. 5425, R. S. 1909, an instruction that if the jury found for plaintiff, they should award her not less than \$2000 and not more than \$10,000, as they might deem fair and just under the evidence, with reference to the necessary injury resulting to her from the death of her husband, and in determining what such injury is, they should consider all the evidence bearing upon that subject, was correct.
8. **MASTER AND SERVANT:** Action for Death of Car Repairer: Assumption of Risk. In an action for the death of a car re-

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pairer, who, while at work under a car being built by defendant, was run over as the result of said car being struck by a train of cars operated by defendant without any warning being given of its approach, *held* that defendant did not assume the risk of injury as a matter of law.

9. ____: ____: ____: **Liability of Master.** The employer's duty to furnish his employees a reasonably safe place in which to work is a continuing one, and hence where a car under which an employee was working was safe at the time he commenced work, but was subsequently made unsafe by the employer's negligence in causing a train of cars to strike it, without giving warning to the employee, as result of which he was killed, the employer was liable for his death, and a recovery could not be denied his widow, in an action under Sec. 5425, R. S. 1909, on the theory that he assumed the risk of injury.
10. ____: ____: ____: **Safe Place to Work.** An employee may assume, in the absence of contrary knowledge, that the employer will furnish him with a reasonably safe place in which to work and will not imperil his safety, and hence a car repairer who was at work under a car had the right to assume that his employer would not cause the car to be moved without first notifying him.
11. **REMOVAL OF CAUSES: Diversity of Citizenship: Taking Non-suit as to Resident Defendant.** In an action against a foreign corporation and two individual defendants, residents of this State, where plaintiff took an involuntary nonsuit as to the two individual defendants, *held* that the court did not err in overruling a petition for the removal of the cause to the United States District Court, filed by the foreign corporation defendant; following *Kansas City Suburban Belt Ry. Co. v. Herman*, 187 U. S. 63.

Appeal from St. Louis City Circuit Court.—*Hon. Moses N. Sale*, Judge.

AFFIRMED.

Watts, Gentry & Lee for appellant.

(1) The court erred in overruling the defendant's demurrer to the evidence. The same rule is applicable in this case as that which has been applied in suits by section hands, in suits for personal injuries, and in suits by widows of section hands for damages occa-

sioned by their death by the operation of trains by railroad companies. *Cahill v. Railroad*, 205 Mo. 393; *Brockschmidt v. Railroad*, 205 Mo. 435; *McGrath v. Transit Co.*, 197 Mo. 97; *Sissell v. Railroad*, 214 Mo. 515; *Clancy v. Transit Co.*, 192 Mo. 615; *Evans v. Railroad*, 178 Mo. 508; *Davies v. People's Railway Co.*, 159 Mo. 1; *Degonia v. Railroad*, 224 Mo. 564; *Van Dyke v. Railrod*, 230 Mo. 259; *Ginocchio v. Railroad*, 155 Mo. App. 163; *Hitz v. Railroad*, 152 Mo. App. 687. (2) The court erred in denying the application of the defendant, American Car & Foundry Company, for removal of this case to the United States Court after the plaintiff had taken a non-suit as to the two individual defendants who were originally joined. *Powers v. Railroad*, 169 U. S. 192. (3) The court erred in permitting the plaintiff to testify over the objection of defendant's counsel that she had no means of support except her husband. This was very prejudicial to the defendant, especially where it was a non-resident corporation, since it paraded the poverty of the widow before the jury. There was nothing in the case to justify punitive damages. If there had been, then such evidence would have been admissible, but this action is based purely on negligence. Therefore evidence of the financial condition of either plaintiff or defendant was inadmissible. *Overholt v. Vieths*, 93 Mo. 422; *Stephens v. Railroad*, 96 Mo. 207; *Weller v. Railroad*, 120 Mo. 635; *Railroad v. Roy*, 102 U. S. 45; *Chicago v. O'Brennan*, 65 Ill. 160; *Railroad v. Powers*, 74 Ill. 341; *Railroad v. Moore*, 61 Ga. 151; *Railroad v. Morandow*, 93 Ill. 302; *Railroad v. Johnson*, 103 Ill. 512; *Railroad v. Pitzer*, 109 Ind. 179; *Green v. Railroad*, 122 Cal. 563; *Railroad v. Evans' Administrator*, 23 Ky. L. Rep. 568; *Brennan v. Coal Co.*, 241 Ill. 610; *Gas Co. v. State*, 109 Md. 186.

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George Safford for respondent.

(1) The rule applicable to section hands working on railroad tracks where trains are expected to be running to and fro at all times does not apply to car repairers working about and upon cars on repair tracks in car shops when the employer by custom impliedly contracts to notify the repairers when cars are to be moved, in time to permit them to reach a place of safety, and to refrain from moving such cars until such timely notice is given. *Anderson v. Railroad*, 196 Mo. 448; *Porter v. Stockyards Co.*, 213 Mo. 372; *Koerner v. Car Co.*, 209 Mo. 141. (2) Every fact which the evidence tends to prove, though but in the slightest degree, must be taken as admitted by an instruction in the nature of a demurrer to the evidence, and every inference which the evidence tends to show in plaintiff's favor should be drawn. *Wilkerson v. Railroad*, 26 Mo. App. 144; *Field v. Railroad*, 46 Mo. App. 449; *Bender v. Railroad*, 137 Mo. 240; *Moore v. Railroad*, 73 Mo. 439; *Vautrain v. Railroad*, 78 Mo. 45. (2) The court did not err in denying appellant's petition for removal. (a) We deny that a petition for removal lies when a controversy, for the first time, becomes one wholly between citizens of different states on account of an involuntary termination of the controversy, after the trial has begun in good faith, as to the local defendant. *Lathrop, Shea & Henwood Co. v. Int. C. & I. Co.*, 215 U. S. 247; *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206; *Railroad v. Herman*, 187 U. S. 63; *Knott v. McGilvray*, 124 Cal. 128; *McGilvray v. Knott*, 179 U. S. 680; *McDonnell v. Jordan*, 178 U. S. 229; *Gerling v. Railroad*, 151 U. S. 686; *Fisk v. Henarie*, 142 U. S. 469; *Rosenthal v. Coates*, 148 U. S. 142; *Laidly v. Huntington*, 121 U. S. 179; *Bank v. Claypool*, 120 U. S. 268; *Gregory v. Hartley*, 113 U. S. 742; *Scharff v. Levy*, 112 U. S. 711; *Alley v. Nott*, 111 U. S. 472; *Moon on*

Removal of Causes, art. 187; Moon on Removal of Causes, art. 7; Howe v. Railroad, 30 Wash. 575. (b) But an involuntary nonsuit with leave to move to set same aside and reinstate does not terminate the controversy. State to use Resp. v. Kessler, 15 Mo. App. 590. (c) Nonsuit after demurrer to the evidence has been sustained and timely exceptions saved, is involuntary. Nivert v. Railroad, 232 Mo. 811; Shoe Co. v. Prickett, 84 Mo. 94; Lewis v. Mining Co., 199 Mo. 463; Dunnevant v. Mocksond, 122 Mo. App. 428. (3) The court did not err in admitting evidence as to the pecuniary standing of plaintiff. (a) Such evidence is admissible to show that plaintiff was dependent on her deceased husband for support and the amount he did contribute and would have contributed to her and her children's support. Railroad v. Moseley, 51 So. 424; Railroad v. Jones, 130 Ala. 456; Swift & Co. v. Foster, 163 Ill. 50; Mulhall v. Fallon, 176 Mass. 266; Electric Light Co. v. Sullivan, 22 App. D. C. 115; Fowler v. Furnace Co., 58 N. Y. S. 223, 41 App. Div. 44; Railroad v. Altemeier, 60 Ohio St. 10; Railroad v. Burnett, 38 S. W. 813; Railroad v. White, 56 S. W. 204; Railroad v. Knight, 52 S. W. 640; Railroad v. Davis, 54 S. W. 909; Thoresen v. Railroad, 94 Wis. 129; Cooper v. Railroad, 66 Mich. 261; Railroad v. Crudup, 63 Miss. 291; Pressman v. Mooney, 5 App. Div. 121; Sills v. Railroad, 28 S. W. 908; Ewin v. Railroad, 38 Wis. 613; Johnson v. Railroad, 64 Wis. 425; Annas v. Railroad, 67 Wis. 46. (b) An objection that testimony is "immaterial" is so general that it amounts to no objection at all, and does not constitute proper foundation for the assignment of error in this court. State v. Hailsabeck, 132 Mo. 359; State v. Howard, 203 Mo. 600; State v. Meagher, 124 Mo. App. 333; State v. Crone, 209 Mo. 316; Randell v. Railroad, 102 Mo. App. 342; Lumber Co. v. Rogers, 145 Mo. 445; Gayle v. Car & Foundry Co., 177 Mo. 427.

REYNOLDS, P. J.—The appeal in this case, from a judgment against the American Car & Foundry Company, was originally taken by that company to the Supreme Court of the State. The verdict and judgment were for \$5400. On consideration of the cause the Supreme Court, adopting an opinion by Mr. Commissioner BROWN, transferred the cause to our court, the opinion reported under the title Kettlehake v. American Car & Foundry Company, 243 Mo. 412, 147 S. W. 479.

The action was originally instituted February 5, 1908, by plaintiff, widow of one Frank Kettlehake, against the defendant American Car & Foundry Company and two others for the recovery of damages alleged to have been sustained by reason of the death of her husband. As pleaded in the amended petition, the right of action set out in the first count of the petition purported to be based upon section 2864, Revised Statutes 1899, as amended by the Act approved April 13, 1905 (Session Acts 1905, p. 135), now section 5425, Revised Statutes 1909, \$10,000 being claimed as damages under the provisions of that act. The second count was founded on section 2866, Revised Statutes 1899, as amended by the Act approved March 19, 1907 (Session Acts 1907, p. 252), now section 5426, Revised Statutes 1909. Ten thousand dollars was likewise claimed under this act. Before the case was finally submitted to the jury, plaintiff dismissed as to the second count, so that is out of this case. Recovery was had on the first count and against the appellant American Car & Foundry Company alone, the plaintiff having taken an involuntary nonsuit as to the two individual defendants. It is in connection with this latter phase of the case that a federal question was sought to be injected into the case. We refer to the opinion of Mr. Commissioner BROWN, before cited, for a full statement of the facts connected with this.

The errors here assigned by counsel for the ap-

pellant are four, namely, to the overruling of the demurrer to the evidence, to the admission of improper evidence tending to show plaintiff's poverty, to the giving of improper instructions and to the denial of the application of the American Car & Foundry Company's application for removal of the cause to the United States Circuit, now District, Court.

It goes without saying that the demurrer to the evidence is to be determined on that of plaintiff, respondent here. A very careful reading and consideration of that satisfies us that it was sufficient to take the case to the jury. Plaintiff's husband was a car repairer in the employ of defendant, a corporation created and organized under and by virtue of the laws of the State of New Jersey, engaged in the manufacture and repair of cars in the city of St. Louis. It there had extensive shops and yards, moving cars in and about its yards by locomotive engines owned and operated by it, there being a network of tracks in its yards along which it moved and on which it placed cars in course of construction or repair. Immediately before the accident Kettchake and a fellow employee named Lechner were engaged in what Lechner calls "working bottoms; that is, fastening nuts on the bottoms of these box cars." He further testified that to do this they worked under a car, which had been placed on one of the tracks in the yards of the defendant corporation. He and Kettlehake had been at that work all of the day of the accident, which occurred between four and five o'clock on January 23d. A few minutes after four o'clock on that afternoon having occasion to quit his work temporarily and go to a toilet room, he left Kettlehake at work under the rear car of three cars that were in place. As he was walking away from this car, he saw a switchman or brakeman coming toward him but on the south side of the cars at which witness had been working, witness then being on the north side. When he first saw this

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switchman or brakeman, the latter stopped, facing the engine and train of seven cars that were being backed down along track No. 12, upon which the three cars, under one of which they had been working, were standing. This man "just waved his hand." The cars were then coming down toward the three stationary cars. Witness said that when he saw this man signalling toward the on-coming train, he could see around the three standing cars and there was nobody back there. As the man signalled with his hand the train backed toward these cars under which he and Kettelhake were working. They came down "about as fast as a man could walk." After the man had signalled to the on-coming train, it passed between him and witness. He then heard the bump of the on-coming cars as they struck the foremost of the three cars in place and that was all that he heard in the way of noise. He further testified that this was a few seconds after he had got from under the car where he had been working along with Kettelhake and under which he had left Kettelhake at work, and that no one had walked along past these three cars and no one had hallooed or called out to him or his partner at work there. Witness was standing very near to these cars in place when he saw this man signalling. He described and located it on photographs in evidence, marked it out there and stated that he should judge that it was between ninety and a hundred feet from where he was to where these cars were. While he was at this point there was nobody in sight except this switchman or brakeman. Witness looked back and could see all the way on the south side of the car; there was nobody on the south side or on the north side of the cars. When the cars bumped, witness was between a hundred and a hundred and thirty feet from them, walking pretty fast. He remained away about ten minutes in all and went right back to where he and Kettelhake had been working; met a young man running in that direction who

told him to take hold of a ladder. They constructed a stretcher out of that, went to where Kettlehake was and found him lying near the center of the car about a foot or a foot and a half from it; was lying there moaning and holding his leg; his pants were torn and bloody, torn at the knee. It was not to exceed eight or ten minutes from the time he had left Kettlehake at work until he got back and saw him lying at the side of the car. When he saw this switchman the latter was standing between these three cars and the on-coming train, apparently at or near a curve in the track and this switchman went back along the curve to where he could see his own train and gave a signal, giving it with his hands. As soon as the signal was given the engine and the seven cars came along and witness heard the crash of the impact and that, he insisted, was the only noise he heard; heard no one call out before he left or while he was at work a few seconds before under the car with Kettlehake. His hearing was good; was sure he would have heard anyone that had called out to them to look out. When going toward the toilet met a couple of men who had been engaged at the same kind of work on the other end of the same car upon which he and Kettlehake had been working and spoke to them; looked at his watch, on their request, and told them it was five minutes past four.

Another witness, who was looking out of the window of a house near the yards of the defendant corporation, testified that he saw a man standing up working upon or near, within an arm's length, of the corner of a new freight car, one of three cars that had been standing on a track in the yards of the defendant corporation's plant for several days. He saw an engine and several cars moving along the track toward these three standing cars and move them some distance, so that the car he saw the man working on struck that man and left him lying upon the ground,

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hallooing and waving his arms. Witness ran about two hundred feet and met one Caporal, also working for the defendant corporation, as was the witness, and told him a man was hurt "in the car shops," to go and see about it. Caporal started right off and, as he testified, told the people in the office that a man had been killed "in the yards." Going with others of the employees to search for the man they found him lying by the third car of the three that were in place on track twelve. He was lying down about three feet from the rail of this track. That was about six or seven minutes after witness had been told of the accident. When he got there there was no engine about. This witness and the preceding one were unable to speak English, the first one referred to, who said he saw Kettelhake run over, giving his deposition through an interpreter.

Another witness, who with his partner had been working on the same car with Kettelhake and Lechner, testified he had quit work while Kettelhake and Lechner were still at work—saw them working under the bottom of the car and spoke to them; shortly afterwards met Lechner as the latter was hurrying to the outhouse—toilet room, and spoke to him. About fifteen minutes afterwards heard of the accident to Kettelhake; did not go back to see him; just heard he was killed.

While the witnesses for plaintiff testified that it was the custom of the employees of defendant corporation, in charge of its trains, to give warning of an approaching train, and while the witness Lechner, as we have above stated, testified most positively that no one had warned them on this occasion, either by walking along the cars under which he and Kettelhake were working, or by calling out, it is due appellant to say that a witness for appellant testified that he was the switchman and of the crew of the backing train on this occasion and that he had walked the whole

length of the three cars, looked under them and called out, for the benefit of anyone at work there, "look out." He rather weakened this by saying, on cross-examination, that he was sure he had done so on this occasion because that was his custom. It was in evidence that the crew of that train did not know they had run over or hurt anyone until a couple of hours afterwards. Plaintiff's husband died the day following the accident. It was in evidence that he had been sent to this place to do this work by a person representing the defendant corporation, having authority to do so; that he had worked for the defendant corporation some time and that he was in the discharge of his usual duties in repairing cars when the accident happened.

Under this state of facts we think that plaintiff made out a case for the consideration of the jury and that the demurrer to the evidence was properly overruled. It is further to be said that with the evidence introduced by appellant before them, contradicting that of plaintiff as to warning having been given, the jury alone, guided by proper instructions, are the ones to pass upon which version is correct; their verdict on that issue concludes this court.

The evidence complained of as improperly admitted was that of plaintiff herself. She testified that she had lived with her deceased husband for nineteen years and up to the date of his death; that he had worked for her all their married life and had supported her. The court asked her if she had any other means of support, excepting him. To this counsel for defendant, appellant, objected "as immaterial." The objection was overruled and defendant excepted. The witness then answered that she had not, that he was supporting her and the family. She afterwards, and without further objection, testified that her husband had worked for her and given her all of his earnings, testifying as to what they amounted to, and his age,

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and to the number of children they had and their ages, all minors; that her husband was in good health up to the time of his death; had worked for the defendant corporation for nearly three years; testified that he understood and spoke English; that his hearing and eyesight were good and that during all of their married life they had lived in this State.

The only objection interposed was to the questions by the court which we have set out, and that objection was that it was "immaterial."

We might dispose of this by saying that our Supreme Court has held in many cases that such objection is insufficient and does not constitute proper foundation for the assignment of error, being too general. As see *Gayle v. Missouri Car & Foundry Co.*, 177 Mo. 427, l. c. 454, 76 S. W. 987. That is the rule even in criminal cases. *State v. Crone*, 209 Mo. 316, l. c. 330, 108 S. W. 555.

We are not overlooking the rule that when objection has been once made and acted upon and the ruling saved, it is unnecessary to repeat that objection to the same line of testimony. [See *Gold v. Pian Time Payment Jewelry Co.*, 165 Mo. App. 154, l. c. 163, 145 S. W. 1174.] But the objection must be a proper one—made with certainty. We place our ruling as to this evidence on the further ground that it has been distinctly held by our Supreme Court in *Boyd v. Missouri Pac. Ry. Co.*, 236 Mo. 54, 139 S. W. 561, that in actions under this section of the statute, the widow who seeks damages for the death of her husband may give in evidence the number and ages of minor children as bearing on her pecuniary loss. So we held in *Hartnett v. United Railways Co.*, 162 Mo. App. 554, 142 S. W. 750. It is held in the Boyd case that this section, while providing for a minimum and a maximum amount at the discretion of the jury, has a remedial side and as looking to that, the jury may consider the extent of the injury, and that as it also has a penal side, the

jury has a right to consider the facts of the defendant's negligence; in brief, that it is both penal and compensatory. We see no error in the admission of this testimony to which objection was made. Surely if competent to show the burdens cast upon the widow by the death of her husband by reason of her having children dependent upon her, it is competent, as tending to show what she had lost in the death of her husband, to prove that she had been left penniless and thrown on her own resources to support herself and the minor children.

In this view of the case we see no error in giving the instruction of which special complaint is made. That told the jury that if they found for plaintiff they should award her not less than \$2000 nor more than \$10,000, "as you may deem fair and just under the evidence in this case with reference to the necessary injury resulting to her from the death of her husband; and in determining what such injury is, you should consider all the evidence before you, bearing upon that subject." As section 5425 is interpreted by our Supreme Court in *Boyd v. Missouri Pac. Ry. Co.*, supra, we hold this instruction proper.

The only objection made to the other instructions, particularly the main instruction given by the court of its own motion, is the very general one that in setting forth the facts on which the plaintiff was entitled to recover, it "is subject to the criticism that even if the facts therein stated were admitted to be true, no right of recovery arose therefrom because of the rule invoked" by counsel in contending that the demurrer to the evidence should have been sustained. The gist of this contention of counsel is that the husband of plaintiff had assumed this risk, which resulted in his death. *Degonia v. St. Louis, I. M. & S. R. Co.*, 224 Mo. 564, 123 S. W. 807; *Van Dyke v. Missouri Pac. Ry. Co.*, 230 Mo. 259, 130 S. W. 1; *McGrath v. St.*

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Louis Transit Co., 197 Mo. 97, 94 S. W. 872, and the like are relied upon in support of this contention.

Our court in Peppers v. St. Louis Plate Glass Co., 165 Mo. App. 556, 148 S. W. 401, determined that the rule announced in the McGrath case, while applicable to section hands engaged in their work, did not apply to a case such as this. The writer of this dissented from the majority of his associates in that case; but it must now be accepted as the decision of the court. The case at bar is governed, as to this aspect of it, by the decision of our Supreme Court in Koerner v. St. Louis Car Co., 209 Mo. 141, 107 S. W. 481. The facts in that are quite similar to those in the one at bar. There it is held that where the defendant corporation, through one of its managing superintendents, had sent an employee to work on an unfinished car on one of its tracks, it was its duty to provide against other cars running down against the car upon which he was working and to see that other cars which were pulled out were not attached to the car upon which he was working, without giving him warning of the intention to move that car. It is also there held that while the employee, in entering the service of the employer, assumes the risks that ordinarily and usually are incident to the business being conducted by the employer, the employee does not assume the risk arising from the employer's neglect to adopt suitable precautions for his safety. That duty is a continuing one and it will not suffice to say that when the employee went to work at that place it was reasonably safe. If the place was afterwards rendered unsafe by the negligent act of the employer in sending a switching crew in there who negligently moved the car upon which the employee was working, without giving him warning of their intention to move it, then the employer is liable for the consequences of this negligent act of the crew in charge of the moving train. The employee had a right to presume, in the absence of knowledge to the

contrary, that the defendant would furnish him a reasonably safe place to work; that the employer would not imperil his safety by sending its other employees in to move the car upon which he was working without notifying him. In the case at bar the jury were instructed very accurately along these lines. There was contradiction and conflict in the evidence as to whether a warning had been given, but there was positive, affirmative evidence that none had been given to plaintiff's husband while he was at work in this dangerous position, and it was for the jury to determine, as already remarked, which version it would accept. There is no reversible error, therefore, presented in this case so far as concerns the evidence or the instructions.

The only remaining proposition in it is as to the refusal by the court to sustain the petition of defendant corporation for removal of the cause to the United States District Court. The facts connected with that are set out with sufficient particularity by Mr. Commissioner Brown in this case when before the Supreme Court, and we refer to his opinion, before cited, without repeating them here. We are unable to understand in the light of the facts here how it could be said that by taking an involuntary nonsuit as to the two individual defendants, they had so completely disappeared from the case as to leave the controversy one entirely between plaintiff and the corporation defendant. We think that *Kansas City Suburban Belt Ry. Co. v. Herman*, 187 U. S. 63, settles this. There the Supreme Court distinguishes that case from *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, relied upon by counsel for appellant.

Finding no reversible error, the judgment of the circuit court is affirmed. *Norton* and *Allen, JJ.*, concur.

ALBERT T. JOHNSON, JR., Respondent, v. STEWART & HAY BUILDING COMPANY, Appellant.

St. Louis Court of Appeals, February 4, 1913.

1. **PLEADING: Action on Contract: Sufficiency of Petition.** A petition, in an action on a contract, which pleads the general tenor and legal effect of the contract is sufficient.
2. **REAL ESTATE BROKERS: Action for Commission: Pleading: Variance.** In an action by a real estate broker for a commission for procuring a customer ready, willing and able to make an exchange of real estate pursuant to defendant's terms, *held* that there was no material variance between the contract for the exchange, which was pleaded in the petition according to its general tenor and legal effect, and the contract introduced in evidence, which entered into the details of the transaction much more fully than was set out in the petition.
3. **_____: _____: Sufficiency of Evidence.** In an action by a real estate broker for a commission for procuring a customer ready, able and willing to make an exchange of real estate in accordance with defendant's terms, evidence *held* to support a verdict for plaintiff.
4. **_____: _____: Failure of Wife to Sign Contract: Estoppel.** In an action by a real estate broker for a commission for procuring a customer ready, able and willing to make an exchange of real estate pursuant to defendant's terms, defendant could not defeat plaintiff's right of recovery by showing that the customer's wife did not sign the contract for the exchange, where, at the time the negotiations were terminated, such objection was not made and the refusal to consummate the exchange was placed upon other grounds.
5. **_____: _____: Verbal Contract with Customer.** In an action by a real estate broker for a commission for procuring a customer ready, able and willing to make an exchange of real estate pursuant to defendant's terms, it is not a prerequisite to a recovery that the customer enter into a written contract for the exchange, but it is sufficient if plaintiff procured a customer who was ready, able and willing to make the exchange on the terms proposed by defendant.
6. **_____: _____: Variation in Terms: Estoppel.** In an action by a real estate broker for a commission for procuring a customer ready, able and willing to make an exchange of real estate pursuant to defendant's terms, defendant could not defeat plain-

tiff's right of recovery on the ground that there was a mortgage on the real estate of the customer procured by plaintiff, where, at the time the negotiations were terminated, such objection was not made and the refusal to consummate the transaction was placed upon entirely different grounds.

7. ____: ____: _____. In an action by a real estate broker for a commission for procuring a customer ready, able and willing to make an exchange of real estate pursuant to defendant's terms, where it was shown that defendant at first insisted that he would not take in exchange real estate which was subject to a mortgage, but that he subsequently agreed to do so, and plaintiff then procured a customer who was ready, able and willing to make an exchange, subject to a mortgage, plaintiff's right to a commission could not be defeated by reason of the encumbrance.
8. **INSTRUCTIONS: Ignoring Defense.** An instruction which purports to cover the whole case and allows a verdict for plaintiff must not ignore matters of defense.
9. **INSTRUCTIONS: Nondirection.** In civil cases, mere nondirection is not a ground for granting a new trial.
10. **INSTRUCTIONS: Refusal to Modify.** In a civil action, a refusal of the court to correct its instruction by an addition to it is not erroneous unless the addition requested is correct, from a legal standpoint.

Appeal from St. Louis City Circuit Court.—*Hon. Edwin W. Lee*, Judge.

AFFIRMED.

Barclay, Fauntleroy & Cullen for appellant.

(1) Plaintiff having sued for the "performance of the contract," a recovery cannot be had for a breach of the contract of employment. *Cosgrove v. Leonard, etc., Co.*, 175 Mo. 100. (2) "Exhibit 3" is a complete variance from respondent's alleged instructions, and from the terms of the proposed trade, which plaintiff alleges he accomplished, as stated in the petition. *Green v. Cole*, 127 Mo. 602; *Laclede Co. v. Iron Works*, 169 Mo. 138; *Faulkner v. Faulkner*, 73 Mo. 335; *Jackson v. Badger*, 35 Minn. 53. (3) We assert, as a rule

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of law (a) that, under such a contract as "Exhibit 3" is, defendant was entitled, before plaintiff earned his commission, to a perfect title free from possible litigation, palpable defects, and from doubts, and consists of a title, both legal and equitable, free from any such admitted claim, such as Mrs. Eggmann has in that land. *Campbell v. Harsh*, 122 Pac. 127. (b) A broker is not entitled to commissions for a sale unless the contract procured by him is capable of specific performance at the suit of the vendee; a right to recover damages being insufficient. *Webb v. Durrett*, 136 S. W. 1189. The answer is, it cannot be done, and Exhibit 3 does not have the "drawing power" that it upon its face declares defendant was to have, nor what the petition declares on as having been accomplished by plaintiff. *Aiple & Hemmelman Co. v. Spellbrink*, 211 Mo. 671; *Nesbitt v. Hilser*, 49 Mo. 383. (4) The failure of plaintiff to obtain the wife's signature to "Exhibit 3" is fatal to any recovery in this case. *Hughes & Thurman v. Todd*, 146 S. W. 447; *Aiple & Hemmelman Co. v. Spellbrink*, 211 Mo. 671; 26 Am. & Eng. Ency. Law (2 Ed.), p. 98; *Venator v. Swenson*, 100 Iowa, 295; *Railroad v. Adams*, 62 N. J. Eq. 656; *Clarke v. Reins*, 12 Gratt. (Va.) 98; *Sternberger v. McGowan*, 56 N. W. 19; *Bonnett v. Babbage*, 19 N. Y. Supp. 934. (5) In a suit by the vendor to enforce performance of a contract for the sale of land, the vendee will not be compelled to accept the title unless it is a marketable one; that is, one which will not expose him to litigation. 36 Cyc. 632. (6) The contract must be one that defendant can enforce, upon the terms he authorized the agent to sell on. *Walters v. Daney*, 122 N. W. 430, 23 S. Dak. 481. (7) The court erred in giving plaintiff's instruction. That instruction premitted plaintiff to recover: (a) Even though the wife did not sign Exhibit 3; (b) Even though defendant had specially instructed Johnson that defendant would

not make the trade unless the farm was "free and clear," but, to the contrary, told the jury that even though there was a \$5000 mortgage on the property yet plaintiff could recover; (c) It allowed a recovery even though the "event, such exchange" was not made and never transpired, yet a recovery could be had, whereas the petition says in "the event such exchange should be made" alone, would the plaintiff be entitled to his pay, and which confessedly defendant never made; (d) This instruction allows a recovery, if the jury shall find that on January 11, 1909, plaintiff presented to defendant "a contract," as is therein described, even though that contract, "Exhibit 3," might as it actually did, contain additional and different terms, conditions and requirements, which are not stated in the petition, or in the evidence of plaintiff, and which imposed burdens and changes of obligation upon defendant, which it had never authorized or agreed to. Exhibit 3 is not the contract upon which Johnson acted, or was authorized to act, nor is it the same, in terms or conditions, as is set forth in the petition. Before plaintiff is entitled to his pay, the performance must be upon the identical terms of agency, and, even though the agent may get better terms, yet the principal is not bound thereby. *Nesbitt v. Helser*, 49 Mo. 383.

Sullivan & Wallace and Henderson, Marshall & Becker for respondent.

(1) The rule of law is settled (and recognized in the defendant's second instruction given) that an agent's commissions are earned when he produces a customer ready, able and willing to take the property upon the terms proposed by the owner. *Ballentine v. Mercer*, 130 Mo. App. 605. (2) The rule of law is equally well settled that an owner cannot avoid paying commissions by a refusal to consummate the sale or by voluntarily disabling himself from performance. *Reiger v. Merrill*, 125 Mo. App. 541.

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REYNOLDS, P. J.—Action by plaintiff against the defendant, a corporation to recover \$1000 claimed to be due plaintiff by defendant for services rendered in connection with the attempted exchange of property of defendant for other property. It is averred in the petition that plaintiff, being a real estate agent, and defendant a corporation, and the latter, on and prior to the 11th of January, 1909, being the owner of a certain parcel of ground in the city of St. Louis, on which was located four certain flats or buildings, the whole covered by certain deeds of trust aggregating \$24,000, and due in about two and one-half years from the 11th of January, 1909, with interest at the rate of six per cent per annum, payable semi-annually, desired to exchange this improved real estate, which, for brevity, we hereafter refer to as "flats," subject to these incumbrances for either farm property in this State or for vacant lots, and that for the purpose of effecting the exchange defendant had placed the matter in the hands of plaintiff and employed and directed him to procure for defendant such exchange, defendant agreeing to pay plaintiff for his services in that behalf the sum of \$1000; that in pursuance of the employment and agreement, plaintiff entered upon the discharge of the duties thereby devolving on him and procured and offered to defendant sundry and various tracts and parcels of farm land in exchange or barter for the flats; that defendant failed and refused to accept any of these proposed exchanges until on or about December 5, 1908, when plaintiff submitted to defendant a written proposition from the owner thereof, one Tancred P. Eggmann, to trade a farm of 520 acres, situate in Phelps county, Missouri, subject to an incumbrance thereon of \$5000 for the aforementioned flats, the latter to be taken subject to the \$24,000 incumbrance mentioned; that defendant again agreed with plaintiff that in the event the exchange

was made defendant would pay plaintiff \$1000 for his services in that behalf; that defendant and the agent of the owner of the farm visited and inspected the farm at the cost of plaintiff and the agent of the owner of the farm on the 11th of December, 1908 and that thereafter Messrs. Stewart and Hay, officers and agents of defendant, visited the farm on the 13th of December, and after so doing entered into further negotiations for the exchange of these properties; that these negotiations continued from time to time until about the 7th of January, 1909, when the defendant proposed and agreed to exchange its flats, subject to the existing indebtedness thereon of \$24,000, and subject to an additional incumbrance to be placed thereon in the shape of four deeds of trust securing in the aggregate \$3000, making a total aggregate incumbrance against the flats of \$27,000, for the farm, the defendant to take the farm subject to its incumbrance of \$5000. That thereafter the proposition of defendant for the exchange of the properties was considered and discussed by the parties to the proposed exchange and their agents and the proposition of defendant was finally accepted by Eggman, owner of the farm, on the 11th of January, 1909, on which date plaintiff presented to defendant "a contract for the exchange of said properties according to the terms of the proposition and agreement made by the defendant and accepted by" Eggman, which contract was dated on the 11th of January and duly signed and executed by Eggman, "and which contract was exactly in conformity to the proposition of the defendant for the exchange of said properties." Notwithstanding this, and notwithstanding that plaintiff had procured and did offer to defendant the written contract of the owner of the farm for the exchange thereof for the four flats of defendant, and notwithstanding the fact that Eggman was ready, able and willing to make the exchange, it is averred that defendant wrongfully refused to sign the

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contract of exchange or to carry out the proposition for the exchange of the properties and still refuses so to do, and that notwithstanding plaintiff has in all things performed and carried out his part of the contract of employment defendant has failed and refused and still fails and refuses to pay plaintiff the \$1000 agreed upon, or any part thereof, for his services in negotiating the exchange. Judgment is demanded for \$1000 with interest and costs.

The answer, beyond admitting the incorporation of defendant, is a general denial.

The cause was tried before the court and a jury and resulted in a verdict and judgment for plaintiff for the full amount claimed. From this latter, filing its motion for a new trial and saving exception to that being overruled, defendant has duly appealed to this court.

Learned counsel for appellant make six assignments of error, which we will consider in their order.

It is assigned that the court erred in overruling the objection of appellant to the introduction of the contract for the exchange of the respective pieces of real estate. The objection made to the introduction of this contract is that it varies from the contract as pleaded. Consideration of that contract and comparison of it with the averments of the petition fail to support this assignment. It is true that the contract offered and admitted in evidence enters into details of the transaction much more fully than as set out in the petition; for instance, the contract provides specifically about delivery of possession of the respective properties, exchange of abstracts, who shall pay the cost of obtaining the abstracts, disposition of crops on the farm, etc. These are all matters of detail, however, and while important enough in the contract itself and possibly necessary and material when that contract came to be carried out, do not affect the general tenor of the contract between the parties. That

general tenor as well as the legal effect of the contract are correctly set out in the petition and that is sufficient. [Moore v. Mountcastle, 72 Mo. 605.] We find no material variance between the contract pleaded and the contract which was offered and introduced in evidence.

The second assignment of error is to the action of the trial court in refusing to give the instruction which was requested by appellant at the close of all the evidence, that the jury should find for defendant and against plaintiff in this case. Necessarily this involves an examination of the testimony.

The principal, in fact all the material testimony in the case was given by plaintiff in his own behalf, and by Messrs. Stewart and Hay in behalf of defendant. Messrs. Stewart and Hay were the officers of the corporation defendant who had acted for it in the matter, it appearing that they and their wives are the sole stockholders and members of defendant, the management of its affairs and business being in the hands of the husbands. It is said by counsel for appellant that "all the material evidence which was given by respondent in support of his claim was contradicted by the evidence of appellant, yet, inasmuch as the jury found in favor of respondent we will set forth his testimony at length as a statement of what his claims are, but which appellant insists does not entitle respondent, who was plaintiff below, to a recovery, and which does not support the verdict and judgment in this case." Those counsel have accordingly set this testimony out in full. Without repeating it in detail, we summarize it.

It appears that appellant was the owner of a certain lot or lots in the city of St. Louis, on which it had erected four flats. Title to this property was in appellant, subject to a deed of trust having about two and one-half years to run, the debt drawing six per cent interest, there being \$6000 incumbrance upon each

of the flats, a total of \$24,000. Defendant is in the general contracting business, apparently buying unimproved property and making a loan on it with the proceeds of which it made improvements. In all of the matters between plaintiff and defendant, the latter was represented by Messrs. Stewart and Hay; when we mention them we refer to them as representing defendant, now appellant, or when using the term "defendant" or "appellant," we refer to the acts of these gentlemen; when the word "they" is used, it usually applies to them as representing appellant. Mr. Hay appears to have approached respondent, who is a real estate agent, and told him that they were carrying more of this incumbered property, "more load," than they cared to, and wanted to exchange their city property for other property, preferably country property; and while they had several pieces of this incumbered property that they wanted to unload, and of which they gave a list to respondent, they called his attention particularly to these flats because, as respondent stated, they were considered better to trade on. Mr. Hay told respondent the rental, the size of the lots, the amount of the deeds of trust and particulars of the property, and on respondent asking him the valuation at which they wanted to exchange them, Mr. Hay stated that on the exchange basis they wanted \$10,000 a set, that is, wanted to put the four flats in at \$40,000; that there being an incumbrance of \$24,000 on the building it made the equity worth \$16,000. Respondent asked Mr. Hay if appellant was willing to assume an incumbrance on a farm or other properties. Mr. Hay said they would but they preferred unloading; that they considered they were "pretty well loaded up," and that their object was to "unload," and that the smaller the incumbrance the better they would be suited. After discussing the valuation at which the flats should be placed in any exchange propositions, respondent suggested a farm in St. Louis county which all parties

concluded they would go and look at. Mr. Hay then asked respondent what commission he expected in case an exchange was effected. Respondent testifies that they figured around a little and finally he told Mr. Hay that if he would put the flats on the \$40,000 basis, the commission would be \$1000, and respondent and Mr. Hay agreed that the property should be put on the basis of \$40,000 valuation for trading purposes, although Hay insisted that that was the real value of the flats. The parties examined the St. Louis county farm and found it did not suit and that was turned down. As they were returning from the inspection of this farm, Messrs. Hay and Stewart said to respondent that they were in earnest about this proposition but that respondent could not get \$1000 and "hand over that kind of a farm;" that appellant would like to pay respondent the \$1000 all right but he would have to get "a decent farm." They told respondent to look around and get them another farm; that it did not have to be particularly close to St. Louis. Respondent afterwards submitted for consideration of appellant some vacant property in St. Louis, which was offered free and clear of incumbrance, for the equity in the flats. That proposition was turned down. Continuing his effort to find a suitable piece of property for exchange, respondent, about the first week of December, 1908, called Mr. Hay into his office and told him they were offered an exchange of a farm of 520 acres near St. James, Missouri, for the flats in the city, subject to the \$24,000 incumbrance and that the agent who represented this farm claimed it was a \$25,000 farm. Respondent suggested to Mr. Hay that to equalize the \$20,000 equity, which the owner of the farm claimed, it would be necessary to increase the value of the equity of appellant; that they should put the flats in on a trade valuation at \$44,000 instead of \$40,000. Accordingly the valuation of the flats was raised to \$44,000, making the equity of appellant in

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them worth \$20,000 to offset the value of the equity claimed to be in the farm. This was all explained by respondent, as he testifies, to Mr. Hay. Mr. Hay said that Mr. Stewart was from the section of the country where this farm was located and would possibly know a great deal about it; that he would talk to him about it, and that they had a man working for them who would undoubtedly know the farm. Subsequently respondent introduced Mr. Hay to the agent of the owner of the farm and an arrangement was made by which a salesman of the respondent, Mr. Hay and the agent of the owner of the farm went down and inspected it. In arranging for this inspection respondent and Mr. Hay had a conversation in which Hay called attention to the fact that they had put the flats at \$40,000 and that the respondent had raised them to \$44,000 for the purpose of the trade and asked him (respondent) if they had to pay an extra commission on the \$4000 added to the nominal value or trading value of the property. Respondent said, "No," that the contract called for \$1000 as his commission and even if the property was put at \$100,000 he was to be paid only \$1000 as his commission. That was agreed to. Whereupon Mr. Hay and the other two gentlemen referred to went down and inspected the farm. On their return from there Mr. Hay announced himself satisfied with the farm. He said that he and his associate Stewart would go down and look it over. Respondent offered to go with them or send a representative. Hay said, "No," that they did not desire respondent or anyone representing him to go with them; that they wanted to look at it for themselves. After they returned from a visit to the farm respondent called up Messrs. Hay and Stewart on the telephone and asked them about the situation. They said Mr. Hay would call on respondent. Accordingly Mr. Hay went to respondent's office and told him they had not yet arrived at a conclusion as to what they would do but he thought that

about the best they could do would be to exchange the flats of appellant, subject to the incumbrance of \$24,000, for the farm free and clear of incumbrance. Respondent said to Mr. Hay that it was hardly probable that the owner of the farm could do that or that he would "have \$5000 cash laying around," to which Hay said, "Well, of course, we would be perfectly willing to assume that \$5000 and let us take his second deed of trust for the \$5000 on the flats." A few days afterwards respondent received a letter from appellant containing a proposition as to the trade but what that proposition was is not in evidence. It was not accepted. Some days afterwards respondent told Mr. Hay that the agent of Eggman, owner of the farm, had made a counter-proposition, to the effect that Eggmann was willing to exchange the farm subject to the \$5000, for the flats subject to \$24,000, and in addition give back a second deed of trust for \$500 on each set of flats; that is for \$1000. That proposition was rejected by appellant and it made a modified proposition to the effect that appellant would take the farm subject to the \$5000 provided the owner of the farm would give a second deed of trust amounting to \$4000 on the flats. Appellant finally reduced this to \$3000 and the matter was again taken up with the agent of Eggmann until finally the parties agreed upon \$750 as the amount of the second deed of trust on each of the four flats, a total of \$3000. This understanding was reached after negotiations had apparently been abandoned between all parties. So that the final arrangement was that appellant would take the farm subject to the \$5000, and Eggman take the flats subject to the \$24,000 then on them and give a second deed of trust amounting to \$3000, a total incumbrance on the flats of \$27,000. This understanding arrived at, respondent made a draft of the proposed contract between Eggmann and the defendant corporation, took it to the home of Mr. Stewart or Mr. Hay, went over it with them, settled

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on certain changes to be made, and Hr. Hay wrote out on a letterhead of the defendant company the proposed modifications. Respondent then said to them, Hay and Stewart, "Now, gentlemen, do these represent the changes you want in that contract?" They said that they did. Respondent asked them whether, if these changes were inserted in a new draft of the contract, the balance would be all right, to which they answered, "Yes." Respondent then told them he would draw up a new contract accordingly, and asked them when they could sign it. They said they would come down to his office Monday afternoon, this occurring on Saturday, and would sign it, both Hay and Stewart insisting that they wanted the deal carried through as quickly as possible. Respondent took the paper and redrafted it in accordance with these suggestions, sent it over to East St. Louis, had it signed by Eggmann, and notifying defendant of that fact, on Monday afternoon requested Hay and Stewart or one of them to call at his office that Monday afternoon and sign it up. This they agreed to do. Neither of them appearing at that time, respondent waited in his office until about six o'clock, when Mr. Stewart came in. Respondent told him that they had been waiting for him and had about given him up; that they had the contract all signed and had waited all that afternoon for him. He thereupon handed Stewart the contract which had been signed by Eggmann. Stewart read it, said that it was all right, except that the words "good titles" should appear in place of "perfect titles," but on talking the matter over with respondent waived that. Respondent then said to him, "Well, sign it." Whereupon Mr. Stewart said, "Well, I'll tell you Mr. Johnson, it looks like if we make this deal we are going to get into trouble." Respondent said, "What do you mean?" To which Stewart said, "Well, it appears that we will have two commissions to pay." Respondent asked him how that happened, when Stewart handed

him a special delivery letter which he said he had received from certain real estate agents, and told respondent to read it. In this letter these agents claimed to have had an understanding with appellant that the flats were in their hands for sale and that on any sale or exchange they were to have a commission of two and one-half per cent. Respondent asked Mr. Stewart if he had an exclusive contract with these people and Stewart said, "No," and on Johnson telling him that these agents could not collect off of him even though he had signed an exclusive contract, Stewart said, "Well, another thing, Johnson, who is this Tandered P. Eggmann?" Respondent told him that he lived in East St. Louis, and on Stewart asking him if he knew him, respondent said he did not but knew that there was such a man because his (respondent's) agent had been over there that very afternoon and saw him sign the contract, and that Mr. Eggmann had then declared he was the owner of the farm. Respondent offered, if there was any doubt about it, to send over for Eggmann and have him come over. Stewart said that was what he wanted; he wanted to see this man and wanted to talk with him. It was arranged between respondent and Stewart that respondent would have Mr. Eggmann at his office the following day, which Stewart agreed to. Respondent thereupon made arrangements for Mr. Eggmann to be over at one o'clock the next day. At eleven o'clock of that day Mr. Stewart called up respondent and told him that he would not be down at one o'clock. Respondent told him he had made arrangements with Eggmann to meet him (Stewart) there at one o'clock; that Eggmann was a business man and that he (respondent) thought Stewart ought to make that appointment good and ought to keep it; that if he failed to do so it would put respondent in a bad position with Mr. Eggmann. Stewart replied, "We have concluded not to make the deal." Whereupon respondent said, "Stewart, this is rather

late in the day for you to make such a proposition as that. We have worked awful hard on this proposition for about six weeks. We have complied with every demand you made, got Eggmann to concede every point that you have demanded, and after the contract is signed by him and we have reported to Eggmann that those are the terms you would trade under, you turn it down." To which Stewart replied, "Well, we have concluded to let the deal drop." Respondent said, "Well, Stewart, if you have come to that conclusion, we have not, because I am out too much money and time on this thing. I have had every man in the office working on this thing for practically six weeks." Stewart then suggested to respondent whether he could conscientiously ask a customer of his to complete a deal when that customer felt in his own mind it was not the best proposition, to which respondent answered by a counter-question, to the effect that if Stewart was building a house for a customer and had followed out every specification that man made, and that man had permitted him to go ahead with the house, "until you had driven the last nail and then said to you, 'We don't want to take that house; we don't think it is the best thing for us to do,' what would you think?" To which Stewart said, "Well, of course, now, Johnson we don't want you to be out anything on this thing." Stewart then offered to reimburse respondent for his outlay, but that not being satisfactory and respondent insisting that he had carried out his arrangement and done all that was required of him to do in the matter and was entitled to his commission, after further talk over the matter of adjusting commissions, appellant, as respondent testified, "point blank refused" to go on with the exchange. This was the last conversation the parties had over the matter and these are the only reasons which were given at the time by appellant's representatives for refusing to consummate the deal.

This is practically the material testimony of respondent.

Our conclusion on it is that it was sufficient to take the case to the jury and to sustain the verdict, provided there was no error in refusing an instruction asked by appellant and refused, upon which refusal the third error is assigned.

The third error assigned is to the refusal of the court to instruct the jury to the effect that if they believed from the evidence that Eggmann, the man who signed the agreement of January 11, 1909, which was introduced in evidence by plaintiff, was a married man at the time that agreement was signed, they would return a verdict for defendant.

It is argued with great earnestness by the learned counsel for appellant that the failure to procure the signature of the wife of Eggman to the agreement, it appearing that he was a married man, was fatal to that agreement. In support of the contention as to the necessity of the signature of the wife to the contract, we are referred to the case of Aiple-Hemmellmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480. That was an action having for its object the specific performance of a written contract for the sale of certain real estate. We do not consider it necessary to go into an examination of that case here. In the view we take of the case at bar, it is immaterial to determine whether the absence of the signature of the wife from the agreement rendered that agreement non-enforceable.

Referring to the point now made that the absence of the signature of the wife from the contract submitted to appellant is fatal to a recovery by respondent, this is to be noted: At the time of the transaction between the parties and when the representatives of defendant threw down the whole deal, no such reason for refusal to go on with the trade was advanced or suggested by appellant. We have set out all the rea-

sons then given. It may well be, as argued by counsel for respondent, that if such a suggestion had been made at the time, the signature of the wife could have been procured. There is no suggestion that she would not sign, when in the course of the trade deeds would have to be exchanged. So that it does not follow that if the contract had been signed by Eggmann himself and by the representatives of defendant, that the wife of Eggman would not have signed the deed. Failing to give this reason for refusing to sign the contract when asked to go on with it, appellant is now shut off from availing itself of it. In *Thompson v. St. Charles County*, 227 Mo. 220, l. c. 234, 126 S. W. 1040, it is pithily said that he who does not speak when he should, may not when he would. Among the many prior cases which have announced this same rule, see *Morgan v. Mulhall*, 214 Mo. 451, l. c. 464, 114 S. W. 4.

Unlike the Aiple-Hemmellmann case, this is not an action for a specific performance of a contract. It is an action to recover commissions claimed to be due and owing, the right to the commission based on the ground that defendant, appellant here, after respondent had performed his work up to the point of securing a customer ready, able and willing to go on with the exchange of the property on the terms upon which the employer of respondent had authorized, that employer, without legal excuse, had withdrawn from the trade and so prevented its consummation. It was not necessary to the conduct of the trade that the customer should have entered into a written agreement to make the exchange; a verbal agreement would have been sufficient up to the point of consummation of the transaction: respondent had done all that was necessary when he secured a party who was ready, able and willing to go on with the trade; how that was evidenced, was, up to that point, immaterial; the customer had been secured; that the wife of that customer was not up to that point a party to the agreement, was imma-

terial. Right there the appellant stopped the trade and rendered all of the labors of the respondent futile. It would have been a useless proceeding for respondent then to have procured the signature of the wife to the agreement, if that signature was essential, and it would have been an idle act as well as one involving unnecessary expense for respondent to have procured a deed from the party and his wife and tendered this to appellant, for appellant had refused to go any further in the transaction.

It is assigned as error that the court refused to instruct the jury, at the instance of defendant, to the effect that if it believed from the evidence in the case that Stewart and Hay were not willing to take the farm in exchange for the flats because of the fact that there was a \$5000 mortgage or deed of trust on the farm and that they so instructed Johnson in any trade he should try to effect, then their verdict should be for defendant. In connection with this assignment is the further one that as plaintiff's instruction, which purported to cover the whole case, omitted this element of it from the instruction that it was error. We consider both of these together.

It may be said as to this first ground as was said of the third assignment, that no such reason was given for the refusal to go on with the contract after it had been signed by Eggmann and when respondent had asked the representatives and agents of appellant to sign it. As we have seen, the refusal to sign—the breaking off of the negotiations—was placed upon an entirely different ground.

The instruction is furthermore subject to the very same criticism that counsel for appellant level against the first instruction given at the instance of respondent, namely, purporting to cover the whole case, it leaves out of view a very material element. Even granting that Stewart and Hay had instructed Johnson to the effect that in any trade he should try to

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make, appellant was not willing to take the farm subject to the mortgage, yet there is abundant evidence tending to show that, granting that such direction was given at the outset, appellant had, either by direct instruction, or by the whole course of conduct in the subsequent negotiations, receded from that direction. The evidence is very clear that one of the conditions of the exchange, as finally agreed upon, was the placing of a second deed of trust to the amount of \$3000 on the flats. If the purpose of that was not to take care, to that extent, of the \$5000 incumbrance on the farm, it is difficult to understand what purpose it could have. This instruction, as asked, should not have been given.

We do not think that the instruction given at the instance of respondent, plaintiff below, is subject to the criticism here made about it. It is true that an instruction which purports to cover the whole case and allows a verdict for the plaintiff must not ignore the matters of defense. We are cited by the learned counsel for appellant to a number of criminal cases in support of their contention, that the court should have covered both sides of a proposition. That is true in criminal cases, as see *State v. Harris*, 232 Mo. 317, l. c. 321, 134 S. W. 535. But the rule is not so in civil cases. In the latter, mere non-direction is not ground for a new trial. [*Morgan v. Mulhall*, *supra*, l. c. 462, *et seq.*] In that case it is said (l. c. 463), "That mere nondirection is not misdirection is a familiar, settled rule of appellate procedure. Under that rule, before appellant can predicate reversible error on what a trial court does not say to the jury, he must first put the court in the wrong by asking it to say something, or else the court in trying to cover the case by instructions holds a false voice, or omits in general instructions essential elements of the case." When a party, in a civil action, asks the court to correct its instruction by an addition to it, that addition must be a cor-

rect proposition. Here, as we have seen, the addition asked was itself radically wrong.

This disposes of all the material assignments.

The judgment of the circuit court is affirmed.
Nortoni and *Allen, JJ.*, concur.

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

MARCH TERM, 1913.

W. R. HODGES, Respondent, v. JAMES H.
CHAMBERS, Appellant.

St. Louis Court of Appeals, March 1, 1913.

1. **TRIAL PRACTICE:** Demurrer to Evidence: Rules of Decision. In determining whether or not a demurrer to the evidence should be sustained, the evidence must be considered in the light most favorable to plaintiff.
2. **AUTOMOBILES:** Injury to Pedestrian: Negligence. Evidence that an automobile whirled into a driveway at a "lively" rate of speed and forcibly struck a pedestrian before he could get out of the way, dragging him fifteen or twenty feet, was sufficient to establish negligence on the part of the chauffeur.
3. ____: ____: Negligence: Contributory Negligence. In an action for injuries resulting from a collision of defendant's automobile with plaintiff on a public driveway, *held* that the questions of negligence and contributory negligence were for the jury.
4. **NEGLIGENCE:** Contributory Negligence: Choosing Unsafe Passageway. A person who was struck by an automobile while he was walking on a public driveway, which, though primarily designed for vehicles, pedestrians had a right to use and did frequently use, is not to be denied a recovery on the theory he knowingly chose a dangerous passageway when a safe one was at hand, where the driveway was not dangerous except when drivers were negligent.

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5. **AUTOMOBILES: Negligent Operation: Construction of Statute.** A driveway which is a public highway need not be "much" used to be within Sec. 8523, R. S. 1909, giving redress to one injured by the negligent operation of an automobile on "public highways . . . or places much used for travel, etc."
6. ____: ____: _____. Sec. 8523, R. S. 1909, giving redress to one injured by the negligent operation of an automobile, being in derogation of the common law, must be strictly construed, and yet it must be so construed as to effectuate the obvious intent and purpose of the lawmakers.
7. **STATUTES: Statutory Construction.** Although a statute which is in derogation of the common law must be strictly construed, nevertheless it must be given such a construction as will effectuate the obvious intent and purpose of the lawmakers.
8. **AUTOMOBILES: Negligent Operation: Degree of Care Required.** The degree of care required by Sec. 8523, R. S. 1909, of one operating an automobile on a public highway to prevent injury to persons thereon, is the highest degree of care that a very careful person would use under the same or similar circumstances.
9. **NEGLIGENCE: Contributory Negligence: Sudden Peril.** Though a pedestrian struck by an automobile might, by acting in a different manner than he did, have escaped the peril in which he was placed, he may recover for his injury, if, in seeking, as he did, to avoid the peril, he acted with ordinary care.
10. **DAMAGES: Personal Injuries: Instructions.** In an action for personal injuries, *held* that the instruction on the measure of damages was correct.
11. **AUTOMOBILES: Injury to Pedestrian: Contributory Negligence: Instructions.** In an action for personal injuries resulting from plaintiff being struck by an automobile, while walking on a driveway which was thirty feet or more wide, defendant requested the court to charge the jury that if they found from the evidence that plaintiff saw the automobile approaching and afterwards had time to avert the collision by using ordinary care in turning out and getting off of the driveway and failed to do so, he was guilty of contributory negligence. *Held*, that the instruction was properly refused, since it cannot be said that it is the duty of one walking on a driveway, thirty feet or more wide, to get off of it on seeing an automobile turn into it.
12. **DAMAGES: Personal Injuries: Excessive Verdict.** A verdict for \$3000 for a fracture of the right arm at the elbow joint, contusions on the hip, leg and head, nervous shock and permanent stiffness of arm and fingers, is not excessive.

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Appeal from St. Louis City Circuit Court.—*Hon. Leo S. Rassieur*, Judge.

AFFIRMED.

H. A. Loevy for appellant.

(1) Respondent is directly responsible for and chargeable with his own negligence in selecting a dangerous roadway on which to walk, namely; one prepared for and only intended for use by automobiles and other vehicles, when he could and should have used the safe stairway prepared specially for use by those on foot. If he had used the stairway where he was absolutely safe, the automobile could not have struck him. And having chosen the dangerous way, he cannot recover. The general rule is that if a person knowingly puts himself in danger and is injured, he cannot recover. *O'Donnell v. Patoñ*, 117 Mo. 20; *Diamond v. K. C.*, 120 Mo. App. 188. (2) The case at bar is just like that of a man deliberately in broad daylight walking on a railroad track towards an approaching train and making no effort to leave the track to escape injury when he could have stepped off the track and used an adjacent path or stopped at the side of the track and let the engine pass him. *Phelan v. Paving Co.*, 227 Mo. 712; *Ray v. Poplar Bluff*, 70 Mo. App. 261; *Hawkins v. Railroad*, 135 Mo. App. 534; *Boyd v. Springfield*, 62 Mo. App. 456; *Meyers v. Railroad*, 103 Mo. App. 274; *Heberling v. Warrensburg*, 204 Mo. 614; *Cohn v. K. C.*, 108 Mo. 392; *Woodson v. Railroad*, 224 Mo. 703; *Gerdes v. Foundry Co.*, 124 Mo. 355; *Tanner v. Railroad*, 161 Mo. 510; *Nivert v. Railroad*, 232 Mo. 645; *Williams v. St. Joseph*, 148 S. W. 460; *Holwerson v. Railroad*, 157 Mo. 231.

George S. Grover and A. R. Taylor for respondent.

The demurrer to the evidence was properly overruled. *Borgner v. Ziegenheim*, 165 Mo. App. 341;

McFern v. Gardner, 121 Mo. App. 97; Sapp v. Hunter, 134 Mo. App. 694; Hall v. Compton, 130 Mo. App. 681.

ALLEN, J.—This is a suit for personal injuries sustained by plaintiff as a result of being struck by an automobile belonging to the defendant and being operated by his servant. The action is brought under Section 8523, Revised Statutes 1909, giving redress to one injured by the negligent operation of an automobile on, upon, along or across “public walks, streets, avenues, alleys, highways or places much used for travel.” The answer was a general denial and a plea of contributory negligence. The cause was tried before the court and a jury, resulting in a verdict for plaintiff for \$3000, and the defendant appeals.

At the time of plaintiff’s injury, he was the auditor of the city of St. Louis, having his office in the City Hall, located on the west side of Twelfth street, between Market street and Clark avenue, in said city. The City Hall building is located some distance back, i. e. west, from the sidewalk extending along the west side of Twelfth street. At the east entrance to the building there is a short flight of steps leading down to an asphalt driveway. The latter is a semi-circular driveway lying between Twelfth street and the building, beginning at the west curb of Twelfth street some distance north of the entrance to the building, crossing over the sidewalk, and, describing practically a semi-circle, passing around in front of these steps leading from the entrance to the building, and coming out again to Twelfth street some distance to the south. One leaving the building by way of said east entrance thereto, going directly east to the sidewalk, passes down the steps above mentioned leading from the entrance itself, crosses the asphalt driveway, passes down another short flight of steps, crosses a granitoid space between two grass plots, and passes down still another flight of steps to the granitoid sidewalk on Twelfth street. The semi-circular asphalt driveway above

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mentioned varies in width from about thirty-seven feet at the entrance to it from Twelfth street—i. e., its northern opening into the street—to about eighteen feet immediately in front of the entrance to the building. The evidence shows that this driveway had been built several years before the accident; that it was designed for the use of vehicles, but that it was also customarily used by pedestrians who desired to take a “short cut” from the east entrance to the City Hall in going to Twelfth and Market streets. To reach the sidewalk from the east entrance of the City Hall it is necessary to at least cross this driveway, and the evidence discloses that pedestrians, instead of going directly east to the sidewalk, frequently take this driveway in order to save a little distance.

On the evening of January 26, 1910, the plaintiff left the City Hall building by the east entrance, and, instead of proceeding directly east to the sidewalk, after descending the steps just at the entrance to the building, turned to the left and took the driveway, in order to go to the corner of Twelfth and Market streets. As he approached the northern intersection of the driveway with the sidewalk on the west side of Twelfth street, the defendant's automobile turned into this driveway from the street. The evidence is somewhat conflicting as to whether plaintiff had actually reached the crossing of the driveway over the sidewalk when the automobile struck him, but at any rate he was at or near this crossing. There is a sharp conflict in the evidence as to what occurred just prior to this time. Plaintiff testified that he was walking a little north of east when he saw the automobile coming; that acting upon the impulse to get out of its way he turned towards the north, i. e. to the left, and made a spring to get out of the way; that before he could do so he was forcibly struck by the automobile on his right arm and right side, and that the next thing that he remembered was being under the machine; that he was un-

conscious for a short time, and that when he regained consciousness he was some fifteen or twenty feet from the point where he was struck. Plaintiff testified that he first saw the automobile "when they whirled around the corner into the driveway from Twelfth street," and that he judged it was then about sixty feet away. There was evidence on behalf of plaintiff that the automobile was going at a "lively" rate of speed, and testimony corroborating that of plaintiff to the effect that he was forcibly struck by it and dragged some fifteen or twenty feet.

The evidence on behalf of the defendant tended to show that in entering the driveway from Twelfth street the horn on the automobile was blown, and that the machine was proceeding at only five or six miles an hour; that defendant's chauffeur saw plaintiff and thought that plaintiff heard the horn and that he was going to wait until the automobile passed by; that, however, when it got almost abreast of him, plaintiff started to cross in front of it; that when the chauffeur saw that plaintiff was going to cross the driveway, he swerved the machine slightly to the south—that is to the left—but that plaintiff then turned back to the south immediately in front of it; that he was scarcely struck at all by the machine, but that he put his hands on the front radiator and slipped down under it. The defendant testified that, as the automobile approached plaintiff, he told the chauffeur to stop, saying "that man appears to have lost his head." At the close of plaintiff's testimony defendant prayed the court to give a peremptory instruction in the nature of a demurrer to the evidence, which was refused by the court; and at the close of all the evidence defendant requested the giving of a like instruction, which was likewise refused.

The cause was submitted to the jury upon four instructions given at the request of plaintiff, and nine instructions given at the request of the defendant.

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Two instructions offered by defendant, other than the peremptory instructions above mentioned, were refused by the court.

Defendant assigns as error the overruling of his demurrer to the evidence; that the court erred in giving the instructions given on behalf of plaintiff, and in refusing the instructions offered by defendant and refused by the court.

As to the error assigned in overruling defendant's demurrer to the evidence, it is sufficient to say that there was clearly sufficient evidence of negligence in the operation of the machine on the part of defendant's chauffeur to make the case one for the consideration of the jury. It is true that, if defendant's evidence be taken as true, it would appear that there was no negligence on the part of the driver of the machine, but that plaintiff unexpectedly stepped directly in front of the same and that the driver thereof could not avoid striking him. However this may be, plaintiff's evidence shows that the machine "whirled" into the driveway from Twelfth street at a "lively" rate of speed and forcibly struck him before he could get out of its way, and dragged him some fifteen or twenty feet. For the purpose of the demurrer, this evidence must be regarded in the light most favorable to plaintiff. It tended to show negligence on the part of defendant's driver, and the evidence in regard to plaintiff's own negligence was conflicting, and he cannot be said to have been guilty of negligence as a matter of law. It was for the jury to determine, under the evidence and guided by proper instructions of the court, whether defendant's driver was negligent, and whether plaintiff was guilty of negligence on his part, contributing to his injuries.

The appellant earnestly insists that the demurrer should have been sustained for the reason that plaintiff, as appellant says, selected a dangerous roadway on which to walk, i. e. one intended for the use of automo-

biles and other vehicles, when he might have chosen a safe way by passing directly east to the Twelfth street sidewalk. Of this we need only say that the evidence shows that the driveway in question was frequently used by pedestrians passing from this City Hall entrance to Twelfth street in order more quickly to reach the intersection of Twelfth and Market streets. Plaintiff, as a pedestrian, had as much right upon this driveway as did the defendant with his automobile, and the defendant owed to plaintiff the duty to exercise toward him, as a pedestrian upon this driveway, that degree of care which by our statute is imposed upon the owners or drivers of such vehicles. Appellant has cited us to a great many cases dealing with the duty of one in crossing or walking upon railroad tracks, or street car tracks, in an effort to show that plaintiff was negligent in walking along this driveway at all, when he might have gone directly east to the sidewalk. There is no doubt as to the correctness of the doctrine of these cases, in their application to car tracks, which as a matter of course are in themselves a warning of danger. These cases have however no application here, for as we have said above the plaintiff had as much right upon this driveway as anyone else, and had the right to presume that one driving an automobile would exercise that degree of care enjoined upon him by law.

Neither is the case before us analogous to the numerous cases cited by appellant in which it is held that one cannot recover where he knowingly chooses a dangerous road or passageway when a safe one is at hand. This for the reason that the driveway in question was a public highway, and could only be said to have been dangerous when made so by the failure of the drivers of vehicles to exercise the care required of them by law. Plaintiff was entitled to rely upon the presumption that such drivers would not be negligent, and hence it cannot be said that plaintiff had

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any reason to suppose that it would be dangerous for him to walk upon the driveway.

Appellant complains of the instructions given on behalf of plaintiff. The first one is assailed because it told the jury that if they found from the evidence that the driveway and sidewalk in question were public highways and were *generally* used for public travel thereon, then, finding the other facts mentioned in the instruction, their verdict should be for the plaintiff. Appellant's contention in this regard is that since the statute under which this suit is brought, viz., section 8523, Revised Statutes 1909, gives redress to one injured by the negligent operation of an automobile on, upon or across "public highways, walks, streets, avenues, alleys, or *places much used for travel*," the words "*much used*" should have been employed in this instruction instead of "*generally used*." There is no merit in this contention. A reading of the statute shows that it was intended to apply to any public walks, streets, avenues, alleys and highways, and that the succeeding words in this clause of the statutes, i. e., "or *places much used for travel*," were simply intended as a general expression to cover all other places which might not be covered by the specific terms theretofore employed in the statute. There can be no doubt, from the evidence, that this driveway was customarily used both by vehicles and pedestrians, although the primary purpose of its construction was evidently to permit vehicles to reach the entrance to the City Hall building, which is some distance from the street. Under the statute it clearly was not necessary for the jury to find that the driveway in question was *much* used for public travel, and there was no error in requiring the jury to find that it was a public highway, *generally* used for public travel. That it was a public highway was sufficient to bring it within the operation of the statute. In this connection appellant says that the statute, being in derogation of the common

law, must be strictly construed. We concede this, but nevertheless it must be construed so as to effectuate the obvious intent and purpose of the statute. [Nicholas v. Kelly, 159 Mo. App. 20, 139 S. W. 248.]

This instruction is also assailed for the reason that it requires defendant's chauffeur, in charge of and operating his automobile, to exercise the highest degree of care that a very careful person would use under like or similar circumstances in operating and controlling the automobile. This is the very degree of care which the statute imposes, and it was proper to so instruct the jury. [Bongner v. Ziegenheim, 165 Mo. App. 328, 147 S. W. 182.]

The second instruction given for plaintiff correctly states the law, both as to the degree of care required by defendant's chauffeur, and also to the effect that even if plaintiff might have escaped the peril in which he was placed by acting in a different manner than he did, yet if the jury found that, in so seeking to avoid said peril, he acted with ordinary care he might still recover. The latter proposition is too well established to require the citation of authorities.

The third instruction given for plaintiff is the usual and proper definition of the term "ordinary care." Plaintiff's fourth instruction as to the measure of damages was clearly a proper instruction to be given under the facts and circumstances of the case.

The two instructions offered by defendant and refused by the court were properly refused. One of them told the jury that if they found from the evidence that plaintiff saw the automobile approaching and afterwards had time to avert the collision by using ordinary care in turning out and getting off the driveway and out of the way of the automobile, and that if the plaintiff, after he saw the automobile approaching, did not use ordinary care in turning out and getting off the driveway and out of the way of the automobile, then plaintiff was guilty of negligence. It can-

not be said to have been plaintiff's duty to get off of a driveway thirty feet or more in width, upon seeing defendant's automobile turn into it. The law did not require this of plaintiff, and the instruction might well have misled the jury as to plaintiff's duty in the premises. And besides the duty required of plaintiff to exercise ordinary care for his own safety was fully set out in other instructions given on behalf of defendant.

The other instruction offered by defendant and refused by the court was clearly improper, in that it required the jury to find only that defendant failed to exercise *ordinary* care in the premises, whereas by the statute he, or the driver of his automobile, was required to exercise the highest degree of care that a very careful person would exercise under like or similar circumstances.

The instructions taken as a whole fairly and properly presented the case to the jury; and considering the nine instructions given on behalf of defendant, which were exceedingly favorable to him and fully covered the case from his standpoint, defendant has no reason to complain of the instructions.

Lastly it is urged that the verdict of the jury is excessive. The evidence showed that plaintiff's injuries consisted of a fracture of the right arm at the elbow joint, contusions on his left hip and left leg and on his head; that he suffered a nervous shock from which resulted two nervous chills during the evening of the day upon which he received his injuries. That at the time of the trial his right arm was still stiff and weak and that plaintiff had little use of it, and could not raise his right hand near his face; that the fingers of his right hand were so stiff that he could not close them, and that he had very little grasping power in this hand; that plaintiff had suffered much pain and that he still suffered from numbness and aching of his right hand; and there was evidence that plaintiff

would never completely recover the use of his right arm and fingers. Under these circumstances manifestly the verdict of the jury cannot be said to be excessive. Certainly the amount thereof is not such as to authorize any interference therewith by this court.

The cause was fairly tried, and the verdict of the jury is amply sustained by the evidence. The judgment of the circuit court should be and is affirmed. *Norton, J.*, concurs; *Reynolds, P. J.*, not sitting.

LEE T. WITTY et al., Respondents, v. WILLIAM SALING et al., Appellants.

St. Louis Court of Appeals, March 1, 1913.

1. **VERDICT: Responsiveness to Issues: Amount of Recovery:** **Pleading: Variance.** In an action to recover a specified amount for the performance of services, in accordance with the stipulations of an express contract, where defendant denied that he was bound by the contract or owed plaintiff anything, a verdict in favor of plaintiff for less than the stipulated amount cannot stand, and the fact that the verdict might be for the proper amount under a theory developed by defendant's evidence would not alter the situation, since the petition did not count, nor was the case submitted, on any such theory.
2. **APPELLATE PRACTICE: Inadequacy of Relief to Respondent: Right of Appellant to Complain.** Where, under the issues, the verdict, if for the plaintiff, must be for a certain amount, and a verdict is rendered for a smaller amount, the defendant is entitled to have it set aside on appeal, although the plaintiff is willing to abide by it.
3. **—: Binding Effect of Supreme Court Decisions.** The Courts of Appeals are bound by the rulings of the Supreme Court.

Appeal from Scotland Circuit Court.—*Hon. Charles D. Stewart, Judge.*

REVERSED AND REMANDED.

Witty v. Saling.

N. M. Pettingill and Smoot & Smoot for appellants.

The petition declares upon an express written contract executed by William Saling, and alleged to have been ratified by his codefendant, Martha A. Saling, by which defendants were to pay as commission the sum of one thousand dollars, and afterwards alleged to have been modified by parol by being reduced exactly two hundred and fifty dollars, leaving the amount seven hundred and fifty dollars sought to be recovered. The evidence all showed that the defendants were indebted to plaintiffs in the exact sum of seven and fifty dollars or nothing. The verdict of the jury for \$500 was in no way responsive to the pleadings, the issues, the testimony or the instructions of the court. It cannot be upheld upon any theory of fact or law claimed by either party to the suit and should not be permitted to stand. *Real Estate Co. v. Pemberton Investment Co.*, 150 Mo. App. 626; *Cole v. Armour*, 154 Mo. 333.

J. M. Jayne for respondents.

STATEMENT.—This is a suit for commissions alleged to have been earned by plaintiffs in negotiating a sale of real estate. Plaintiffs are partners engaged in the real estate business in Memphis, Missouri. The defendants are husband and wife, and the action is for a broker's commission for finding a purchaser for a farm belonging to the defendant Martha Saling, under an express contract executed by the defendant William Saling, and which plaintiffs claim was ratified and acquiesced in by the defendant Martha Saling, who held the title to the property. The contract in question was executed on September 19, 1910, and gave to plaintiff Witty an exclusive agency to sell the farm for a term ending January 1, 1911. Plaintiff McCandless afterwards became a partner with Witty and en-

titled to one-half of the benefits to be derived from the contract. The contract provided that the farm in question, consisting of two hundred acres, was to be sold at the price of eighty dollars per acre, the agent to receive \$5 per acre as a commission, a total of \$1000, if sold at this price; if sold for a higher price, the agent, in addition to the stipulated commission, was authorized to retain everything above the price of \$80 per acre.

The petition is in two counts, each stating the same cause of action in different phraseology, and in each of which the contract is pleaded in substance and legal effect, and in each the plaintiffs aver that they produced a purchaser, one J. Y. Phillips, ready, able and willing to take and pay for said farm at the said price of \$80 per acre, but that the defendants failed and refused to perform the contract on their part and to sell said property. It is further averred in each count that after the execution of the written contract, aforesaid, it was modified by a parol agreement whereby it was agreed that if plaintiffs sold the farm for the said price of \$80 per acre their commission would be reduced by \$250, so that they would receive \$750 instead of \$1000 for consummating the sale. In each count plaintiffs pray judgment for the sum of \$750.

The answer admitted that defendants were husband and wife, and denied generally all of the other allegations of the petition.

The cause was tried before the court and a jury. Plaintiffs offered in evidence the written contract executed by defendant William Saling, and produced testimony tending to show that the defendant Martha Saling had ratified and acquiesced in the same, after knowledge of its execution and terms. Plaintiff's evidence further tended to show that they had produced a purchaser for the property, who was ready, willing and able to purchase and pay for the same but that defendants had refused to consummate the sale. The

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evidence on behalf of the defendants was directed in the main to an attempt to show that defendant William Saling did not know the contents of the contract when he signed it; that he did not have his glasses at the time, and thought that it was like a former contract that he had had with plaintiff Witty; that defendant Martha Saling had never seen the contract and did not know what it was; that she had not agreed to sell the farm upon the terms specified in the contract, nor to pay the commission therein provided to be paid. On cross-examination of defendant Martha Saling, she testified that about the end of October or the first of November, 1910, she entered into a contract to sell the farm in question to one Grimes Carder at \$85 per acre, and that after this she came to plaintiffs to try to get them to deliver up their contract to her.

The cause was submitted to the jury upon instructions, thirteen in number, nine of which were given at request of plaintiffs and four at the request of the defendants. Four instructions requested by defendants were refused by the court. The jury found a verdict for plaintiffs in the sum of \$500, judgment was entered accordingly, and the defendants appealed.

ALLEN, J. (after stating the facts).—The verdict cannot be allowed to stand. Plaintiffs sued upon an express contract. By the terms of the writing itself, they were to receive \$1000, as commission, in case they procured a purchaser ready, willing and able to purchase the property at the price stipulated in the contract. It was averred that the written contract was, subsequent to its execution, modified by parol so that plaintiffs' commission was to be reduced to \$750, and proof was offered to sustain these averments of the petition. Plaintiffs pleaded this contract, as modified by the subsequent parol agreement, averred that they had completely performed the contract on their part by producing a purchaser ready, willing and able

to purchase and pay for the property, and plaintiffs' testimony all went to sustain these allegations of the petition. On the other hand, the defendants denied that they were bound by the contract, and denied that they owed plaintiffs anything whatsoever. The issue thus made was the only issue tried in the lower court, and manifestly the jury was bound either to return a verdict for plaintiffs for the full amount of \$750 claimed by them or for nothing. The verdict of the jury for \$500 is not responsive to the pleadings, and is in the very teeth of the instructions given by the court.

In Weisels-Gerhardt R. E. Co. v. Pemberton Ins. Co., 150 Mo. App. 626, 131 S. W. 353, there was a like verdict in a suit of exactly this character, namely, for a broker's commission for the sale of real estate. This court speaking through NORTON, J. said: "The instructions submitted to the jury the question as to whether or not the contract for commissions was made, and the jury were directed that in the event of a finding for plaintiff the verdict should be for \$6200. Though the jury found for plaintiff, it awarded him a recovery of \$3100, only, or, in other words, precisely one-half the amount sued for. Defendant insists that the verdict should be set aside for the reason it is not responsive to the issue in the case and for the further reason that it discloses on its face the jury acted arbitrarily in the premises and in utter disregard of the evidence and instructions of the court. As a general rule, one is not entitled to a reversal of the judgment because it is more favorable to him than the case asserted in the trial court justifies. [2 Ency. Pl. and Pr., 527.] In keeping with this general doctrine it has been several times decided in this State that a judgment should not be reversed on appeal for the reason it appears to be for a much smaller sum than the plaintiff insists was due on the theory advanced for a recovery. The following cases will illustrate: Alderman v. Cox, 74 Mo. 78; Gaty v. Sack, 19 Mo. App.

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470; Gifford v. Weber, 38 Mo. App. 595; Chinn v. Davis, 21 Mo. App. 363; Crigler v. Duncan, 121 Mo. App. 381, 99 S. W. 61. But in all of these cases the issues were such as to warrant the jury in reckoning with the equities involved and it seems the verdicts were awarded accordingly. . . . The Supreme Court has conclusively settled the question so far as we are concerned in Cole v. Armour, 154 Mo. 333, 66 S. W. 476. The case mentioned is directly in point and under the Constitution it is controlling authority here."

It is earnestly insisted however by respondent that the verdict should be permitted to stand for the reason that there was a clause in the contract whereby it was agreed that in the event the owner should sell the farm to any person not procured by plaintiffs, then plaintiffs were to receive one-half of the specified amount of commission; that defendant Martha Saling testified that she had sold the farm to one Grimes Carder with whom the plaintiffs had nothing to do, and that therefore the jury might well have found that plaintiffs were only entitled to one-half of the commission specified in the written contract, to-wit, \$500. This contention is without merit, for the reason that no such issue as this was made by the pleadings, and the cause was not tried upon any such theory below. The petition counts upon the written contract, as modified by the parol agreement, and avers in positive terms that the plaintiffs sold the property to one J. Y. Phillips, and that plaintiffs thereby became entitled to recover the sum of \$750, the said agreed amount to be paid them as commission. There is not a word to be found in the petition predicating any right to recover upon a sale of the property made by the owner to some purchaser found by her, and no such issue was tried. The instructions given on behalf of plaintiff directed the jury to find a verdict for plaintiff for \$750, in the event that they found facts justifying a recovery by plaintiff at all.

Respondent further urges that the appellants should not be heard to complain that the verdict rendered against them was not as large as it should have been, so long as plaintiffs are willing to abide by it. This contention is disposed of by what we have quoted from the Weisels-Gerhardt case, *supra*. It was not a case in which the jury might exercise a discretion as to the amount of its verdict. Plaintiffs were either entitled to the amount agreed upon as commission or they were entitled to nothing. There is clearly no middle ground which the jury may take, in an attempt to do "rough justice" between the parties.

While it may seem a hardship upon plaintiffs to deprive them of the benefit of a verdict for less than they sue for, when they are willing to accept the amount thereof, we are bound by the ruling of the Supreme Court and cannot allow the verdict to stand.

It is unnecessary to notice the other assignments of error. The judgment of the circuit court is reversed and the cause remanded. *Reynolds*, *P. J.*, and *Norton*, *J.*, concur.

JOSEPH R. PALMER, Trustee, Appellant, v.
BENJAMIN C. WELCH et al., Respondents.

St. Louis Court of Appeals, March 1, 1913.

1. **BANKRUPTCY: Equities of Third Persons: Estoppel.** Under Sec. 70a of the Bankruptcy Act, providing that the trustee is vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, the trustee takes title, not as an innocent purchaser, but subject to all valid claims, liens and equities, and where the bankrupt by his conduct would have been estopped to assert a claim, such estoppel may be invoked against the trustee, in like manner as it might have been invoked against the bankrupt.
2. **ESTOPPEL: In Puis: Silence: Conveyances.** The presiding judge of a county court, who individually held a deed of trust

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on land which was also subject to a school fund mortgage given to the county, at the request of the sureties on such mortgage, attempted to sell the land, and, failing, suggested that they buy it themselves for their own protection, without mentioning his deed of trust. The sureties, relying upon their conversation with him and knowing of his close business relationship with the owner of the legal title, purchased the land without examining the records, or otherwise ascertaining the existence of the deed of trust. In an action by his trustee in bankruptcy to foreclose his deed of trust, held that plaintiff was estopped from asserting the bankrupt's mortgage lien to the prejudice of the grantees, and hence that a decree giving incumbrances on the land paid by them priority over the deed of trust in distributing the proceeds of the sale, although the deed of trust was duly recorded at the time they acquired the land, and although the bankrupt had no intention to defraud them, not having had the deed of trust in mind when talking with them.

3. ____: ____: _____. Estoppel may arise from silence or passive conduct on the part of one who has knowledge of the facts and whose duty it is to speak, if such silence is misleading, since, although, in order to constitute an estoppel, there must be something equivalent to a representation, silence or concealment where one ought to speak is regarded as being, in effect, a "representation."
4. ____: ____: _____. Where one, upon whom rests the duty of disclosing facts to another, fails to do so, his knowledge of their existence will be presumed, and his failure to disclose them, even though it be through negligence and even though he did not actually have them in mind at the time, will, when connected with other essential elements, raise an estoppel against him.
5. ____: ____: ____: Real Property: Recorded Title. Although one's title to real property is of record, nevertheless an estoppel will arise against him, if by representations or by silence or culpable negligence he misleads another with respect thereto, whereby the latter is induced to act to his injury.
6. ____: ____: Elements. While, in order to raise an estoppel, a representation must be made with the intention, either actually, or reasonably to be inferred by the person to whom it is made, that it should be acted upon, it is not necessary that there be an intention to deceive, for, although fraud is an essential element, either actual or constructive fraud will suffice.
7. EVIDENCE: Parol Evidence: Explaining Written Instrument: Conveyances. While parol contemporaneous evidence is inad-

missible to contradict or vary the terms of a valid written instrument, nevertheless the writing should be read in the light of surrounding circumstances, in order to more perfectly understand and explain the intent of the parties; and hence where a deed provided that the grantor was thereby released from all incumbrance on the land, which incumbrance was assumed by the grantee, it was proper to show by parol, in an action in which such assumption was sought to be enforced against the grantee, that the grantee had no knowledge of a particular incumbrance, that the grantor did not have such incumbrance in mind, and that it was not intended that the grantee should assume it.

8. **APPELLATE PRACTICE: Review: Immaterial Matters.** Where, in a suit to foreclose a deed of trust, the *cestui que trust* was adjudged to be estopped from asserting his lien to the prejudice of rights acquired by grantees of the land and the court accordingly gave incumbrances paid by them priority over the deed of trust in the distribution of the proceeds of the sale, it was unnecessary to determine whether such incumbrances were junior or senior to the deed of trust, since the grantees' priority was predicated upon the estoppel.
9. **—: —: Matters Affecting Respondent.** Where, in a suit to foreclose a deed of trust, the *cestui que trust* was adjudged to be estopped from asserting his lien to the prejudice of rights acquired by grantees of the land and the court accordingly gave incumbrances paid by them priority over the deed of trust in the distribution of the proceeds of the sale, the *cestui que trust* could not be heard to complain, on appeal, that the court failed to grant the relief prayed for in the grantees' cross-bill, by reforming their deed, in which they assumed incumbrances on the land, so as to exclude the assumption of the deed of trust foreclosed, inasmuch as the grantees did not appeal from the decree and equity could be done without such reformation.
10. **—: —: Immaterial Matters.** Where, in a suit to foreclose a deed of trust, the *cestui que trust* was adjudged to be estopped from asserting his lien to the prejudice of rights acquired by grantees of the land and the court accordingly gave incumbrances paid by them priority over the deed of trust in the distribution of the proceeds of the sale, the *cestui que trust* could not be heard to complain, on appeal, that the court did not require them to account for crops and timber removed from the land prior to their purchase of it and while they were in possession of it as tenants, for which they had settled with their lessor.

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11. **JURISDICTION: Judgments: Nonresidents.** A personal judgment cannot be had against a nonresident of the State who is not personally served in the State.
12. **MORTGAGES AND DEEDS OF TRUST: Foreclosure: Judgment: Disposition of Parties.** Where, in a suit to foreclose a deed of trust, the court correctly determined that grantees of the land were not personally liable, a judgment should have been rendered for them on plaintiff's demand for a deficiency judgment, in order that that issue be definitely settled.

Appeal from Lincoln Circuit Court.—*Hon. James D. Barnett, Judge.*

AFFIRMED AND REMANDED (with directions).

Chas. Martin and Wm. A. Dudley for appellant.

(1) The element of fraud is not in the case. There was no intention upon the part of Judge Reid to misrepresent a fact or conceal the truth about the deed of trust in order to induce the defendants to buy the land. *Freeland v. Williamson*, 220 Mo. 231; *Keeney v. McVoy*, 206 Mo. 58; *Harrison v. McReynolds*, 183 Mo. 549. By the slightest diligence defendants could have ascertained that the deed of trust was upon the land, before they paid the interest on the county mortgage and levee taxes. (2) The court against the objection and exceptions duly saved by plaintiff, allowed defendants to show that this express contract did not mean what it says, viz.: That Elsberry and Goodman assumed all the incumbrance and released Welch therefrom; but that it meant all the incumbrances except the debt due Judge Reid, involved here. This was a plain, bold attempt to vary and modify an express contract by oral testimony, and was in violation of the elementary rules of evidence. The recital was not a receipt but a contract. *Jackson v. Railroad*, 54 Mo. App. 636; *Construction Co. v. Hayes*, 191 Mo. 248; *Culbertson v. Young*, 86 Mo. App. 277; *Parson v. Kelso*, 141 Mo. App. 369; *Moss v. Railroad*, 141 Mo. App. 217.

R. H. Norton and Avery, Young & Killam filed argument for respondent.

STATEMENT.—This is a suit by Joseph R. Palmer, trustee in bankruptcy of the estate of William W. Reid, a bankrupt, to foreclose a deed of trust upon certain lands in Lincoln county, and for judgment against the defendants for any deficiency that may remain due on the notes secured by the deed of trust, after applying to the payment thereof the proceeds of the sale of such land.

The petition alleges the adjudication of William W. Reid a bankrupt on October 2, 1908, the appointment of plaintiff as trustee in bankruptcy of said bankrupt's estate, the order of the referee in bankruptcy authorizing and directing the bringing of this suit, and avers that the defendant Benjamin C. Welch, for value received, executed to said William W. Reid three promissory notes; one for the sum of \$1500, of date August 18, 1902, due one day after date, bearing six per cent interest from date; another for the sum of \$1500, of date August 28, 1902, due one day after date, bearing interest at the rate of six per cent from date, upon which, on July 12, 1904, there was credited a payment of \$207.96; and a third note for the sum of \$500, of date November 3, 1902, due on or before May 1, 1903, bearing interest from maturity at eight per cent. It is alleged that the two notes for \$1500 each were, on December 4, 1907, marked cancelled, but that this was done by mistake, and that neither of said notes had been paid.

The petition further alleges that, subsequent to the execution of the three notes above mentioned, to-wit, on November 21, 1902, the said Benjamin C. Welch and Anabel Welch, his wife, executed a deed of trust to one W. H. Baskett as trustee, wherein they conveyed a certain tract of land in Lincoln county, consisting of one hundred acres to secure the payment

of the \$3500 evidenced by the three promissory notes above mentioned; which deed of trust was duly filed for record in the recorder's office of Lincoln county, Missouri, on January 11, 1903. And it is alleged that defendant Benjamin C. Welch failed and refused to pay said notes, and that they still remain a lien against the land.

It is further alleged that on the — day of October, 1908, defendant Welch and wife conveyed the land described in said deed of trust to the defendants, Elsberry and Goodman, in consideration of one dollar and the assumption by said defendants of the incumbrances against the land; that at the time of said last mentioned conveyance the deed of trust above mentioned, securing the said notes, was a valid and existing incumbrance against the land, and that said defendants Elsberry and Goodman in accepting the deed conveying the land to them took the property subject to the incumbrances as a part of the consideration therefor and assumed and agreed to pay said notes whereby they became liable personally for the amount due thereon.

The petition prays judgment against defendants for the amount due on said notes, and that the same be adjudged and decreed a lien against the land, and that such lien be foreclosed, the land sold and the proceeds thereof applied to the payment of such judgment, and that defendants be adjudged to pay any deficiency that may be due on said judgment after applying thereto the proceeds of the sale of said land.

Defendants Elsberry and Goodman filed their separate answer, to which plaintiff replied, and the cause came on for trial before the court. Defendant Welch came not but made default. After hearing proof the court, not being sufficiently advised in the premises, continued the further hearing of the cause to the adjourned term of said court. Before the further hearing of the same, the defendants Elsberry and Good-

man, by leave of court, filed their separate amended answer in said cause, wherein they denied the allegations in plaintiff's petition except such as were therein expressly admitted. These defendants then averred that the three notes in question were made without consideration therefor, admitted the execution and recording of the deed of trust as alleged by plaintiff, and averred that the same contained the following clause: "This conveyance is made subject to the incumbrance of a mortgage in favor of Lincoln county, Missouri, dated May 2, 1899, to secure a loan of school funds amounting to \$700." The amended answer further alleged that, while the deed by which they acquired the land from defendant Welch contained a provision that the same was conveyed in consideration of one dollar and the assumption by Elsberry and Goodman of the incumbrances against said lands, nevertheless by contract and agreement with defendant Welch at the time of the purchase of said land, these defendants were to give in consideration therefor the sum of one dollar and were to assume the payment of only the following incumbrances thereon, namely: Levee taxes assessed against said land in favor of the Kings Lake Levee & Drainage District, amounting to \$240, the back taxes and all taxes due the State, county and school fund, assessed against said land, together with the payment of the school fund mortgage above mentioned, of date May 22, 1909, which latter bore compound interest at the rate of six per cent, and on which there was due about the sum of \$1200 at the time these defendants acquired said land; that the defendants had no knowledge or information of the existence of the three notes here sued upon, and that defendant Welch represented to them that there were no incumbrances on the land except the said school fund mortgage and the levee taxes and other taxes above mentioned.

The amended answer further alleged that defendants Elsberry and Goodman were sureties on the bonds

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secured by said school fund mortgage; that defendant Elsberry, prior to the purchase of the land by him and his codefendant Goodman, had a conversation with said W. W. Reid, who was at that time the presiding judge of the county court of Lincoln county, Missouri, at which time he asked Reid to take steps to have the said school fund mortgage foreclosed, or to sell the land in question, so that these defendants would be released from any obligation by reason of being sureties on said bonds; that Reid told him that he had been trying to sell the land to one Galloway, but that the latter had refused to offer sufficient therefor to pay the school mortgage and the levee and other taxes due thereon, and that Reid suggested to defendant Elsberry that the latter and defendant Goodman buy the land and that they would not then lose anything by reason of being sureties on the school mortgage; that in this conversation said Reid made no mention of the fact that he had any deed of trust or claim on the land; that, after defendants Elsberry and Goodman purchased said land, defendant Elsberry had a further conversation with Reid, in which he informed the latter that he and Goodman had purchased the land from Welch at a price sufficient only to pay the school fund mortgage and the levee and other taxes due thereon, and that in this conversation defendant Elsberry told Reid that he had been informed that Reid held the notes here sued upon, and that Reid had then informed this defendant that the indebtedness secured by said deed of trust had been fully paid and discharged and that said lien upon the land had been fully satisfied.

And by said amended answer these defendants Elsberry and Goodman say that plaintiff should not be permitted to enforce payment of said notes as against them, but that plaintiff should be estopped therefrom by reason of the said conduct of William W. Reid.

It is also averred that these defendants Elsberry and Goodman paid to the Kings Lake Levee & Drainage District the sum of \$204, assessed against said lands, and paid the amount of the back taxes, interest and costs due on said land, and paid the county treasurer of Lincoln county all interest due on said school fund mortgage, amounting to about \$500; said payments in all amounting to about the sum of \$750.

The amended answer prays that the deed from Welch to defendants Elsberry and Goodman be reformed to conform to what is alleged to be the true contract and agreement between the parties respecting the consideration clause thereof so that the same would show that these defendants purchased the land in consideration of the sum of one dollar and the assumption by them only of the payment of the school fund mortgage, the levee and other taxes due against said land, and all interest due thereon; praying also, in substance, that if the court shall find that the notes sued on by plaintiff are a lien upon the land in question, then that these defendants, having paid said levee and other taxes and the interest on said school fund mortgage, be subrogated to the rights of the original payees of said indebtedness, and that the court adjudge that these defendants have a lien on the land for the amount so paid by them on account of said indebtedness, prior to any lien which plaintiff may be adjudged to have thereon.

The reply was a general denial of the new matter contained in this answer. After the filing of the amended answer and the reply thereto, further evidence was heard by the court, and thereupon the court made and entered its decree herein.

The evidence showed the adjudication of W. W. Reid, a bankrupt, the appointment of Palmer as a trustee of the bankrupt's estate, and the order of the referee in bankruptcy authorizing the institution of the suit. The three notes in question were placed in

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evidence, as was the deed of trust of date November 21, 1902. The two notes for \$1500 each were correctly described in said deed of trust; the latter purported to secure a \$500 note, of date August 29, 1902, due May 1, 1913, bearing six per cent interest from maturity. The deed of trust upon its face showed that it was made subject to the incumbrance of the school fund mortgage above mentioned. Both of the notes for \$1500 each were indorsed as follows: "I assign the within note to Robert Martin for cancellation. (Signed) W. W. Reid." Across the face of both of these notes there appeared the following: "Presented and cancelled in my presence this 4th day of December, 1907. J. F. Merriwether, Recorder, By K. B. M. D. C. Cancelled, Robert Martin, assignee."

The quit-claim deed from Welch and wife to defendants Elsberry and Goodman, of date October—, 1908, was also put in evidence. This deed contained the following clause: "The parties of the first part are by this conveyance released from all incumbrance on the above described land, such incumbrance being assumed by the parties of the second part."

The evidence tended to show that the three notes were given for money borrowed by Welch, although it appeared that Reid was himself borrowing money at this time. The latter testified that the note for \$500 was the only note of that amount that he held against Welch at the time of the execution of the deed of trust in question, and that it was this note that was intended to be secured by the deed of trust. It appears that Reid and Welch had had a great many business transactions, and Reid's memory was not clear as to how these notes happened to be given; the evidence showed that the two notes for \$1500 each were secured not only by this deed of trust but by a deed of trust executed by Welch and his wife on other land in Lincoln county, the latter being known as the Allen and Sitton tracts. This latter deed of trust also secured

one note for the sum of \$702, and was subject to a prior deed of trust on each of these tracts of land. This deed of trust was admitted in evidence and showed on its face that the debt secured by it had been fully paid and discharged and the property released from the lien and incumbrance thereof.

There was testimony to the effect that Reid had sent these two notes for \$1500 each to be cancelled in order to release the deed of trust upon the Allen and Sitton tracts, for the reason that this land was being sold and would not bring more than enough to satisfy the prior incumbrances, but that these notes had never been paid, and that it was not intended to release the deed of trust here sued upon. And the deed of trust sued upon did not in fact appear to have been released. Reid testified that he did not think that he had any conversation with defendant Elsberry in which he told the latter that there was nothing due on the notes here in controversy.

The evidence on behalf of defendants went to show that defendants Elsberry and Goodman intended, in acquiring the land, to assume only the payment of the school fund mortgage and the levee and other taxes; that these defendants were sureties upon the school fund mortgage, and that their acquisition of the property was merely for the purpose of endeavoring to avoid liability as sureties upon this debt. That defendant Elsberry had a talk with Reid some time before the purchase of the land, telling the latter that the county court was about to bring suit to foreclose the school mortgage, and suggesting that it would be well to have Welch sell the land so as to let them out; that shortly thereafter Judge Reid said to him, "I expect I had better sell this land and let you fellows out;" that Reid endeavored to sell the land to one Galloway for \$1600, but the latter would offer only \$1500; that Reid then said that, since it would take about \$1600 to pay the school fund mortgage with interest thereon,

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and the levee and other taxes, the best thing to do was for Elsberry and Goodman to buy the land themselves. The latter did not deal with Welch, he having removed to Mississippi prior to this time.

Defendant Goodman testified that he talked with Reid two or three times before he and Elsberry bought the land; that the latter said it was best for Elsberry and Goodman to buy the land in order to protect themselves, but said nothing about having an incumbrance thereon.

Welch testified that he inserted in the deed to Elsberry and Goodman the clause providing that the latter assume and pay incumbrances, in order to relieve himself from liabilities for the school fund mortgage and the levee and other taxes; and that at the time he wrote this clause he did not have in mind that he had given the deed of trust to Reid; that Reid and he often talked over their business affairs but that these notes were never mentioned.

The evidence showed that the property in question was worth not to exceed \$1500; that defendant Elsberry and Goodman had it under lease for about two years prior to purchasing it, during which time they raised small crops on part of it and cut some wood off of it. The evidence showed that defendants Elsberry and Goodman had paid the levee and drainage taxes amounting to \$204, other taxes amounting to \$20.68, and had paid the interest on the school fund mortgage amounting to \$564.60; said payments totaling \$784.28, leaving the principal only of the school fund mortgage, to-wit, \$700, unpaid.

The decree entered by the lower court finds the execution of all the notes sued upon, the cancellation by mistake of the two \$1500 notes pleaded, finds all the notes due and unpaid, the adjudication of W. W. Reid as a bankrupt, the appointment of plaintiff as trustee in bankruptcy, and the order of the referee directing the bringing of this suit, and then proceeds as follows:

"The court further finds that on the 21st day of November, 1902, defendant, Benjamin C. Welch, and his wife, Anabell, executed to W. H. Baskett, as trustee, a deed of trust by which they conveyed to said W. H. Baskett the lands described in the petition, which deed of trust was made in trust to secure the payment of three promissory notes hereinbefore described, then owned and held by said William W. Reid who was named as party of the third part in said deed of trust and which deed of trust was duly recorded in book 63, at page 125, in the office of the recorder of deeds of Lincoln county, Missouri, on the 5th day of January, 1903.

"The court further finds that on the 5th day of October, 1908, the said Benjamin C. Welch, and Anabell Welch, his wife, by their deed duly executed, conveyed the lands above described to the defendants, Benjamin D. Elsberry and Tully R. Goodman; that said deed, in the body thereof, after the description of said land, contained the following recital: 'Parties of the first part are by this conveyance released from all incumbrance on the above described land, such incumbrance being assumed by the party of the second part _____' and was duly recorded in the office of the recorder of deeds of said county of Lincoln, on the 20th day of October, 1908, in deed book 78, at page 189.

"The court finds that the amount now due upon the notes aforesaid held by plaintiff, as trustee, is the sum of five thousand, four hundred, eighty-six and 43-100 dollars, but the court further finds that at the time of the execution of the deed of trust hereinbefore named, there existed a school fund mortgage executed to the county of Lincoln, in the sum of seven hundred dollars, by said Benjamin C. Welch, and wife, which with the accrued interest thereon, was a prior lien and incumbrance on said land and that the defendants, Elsberry and Goodman, had signed as sureties the bond

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for which said mortgage was given; that at said time, there had also accrued and become due certain taxes and assessments for levee and drainage improvements on said land, amounting to two hundred four dollars, also State and county taxes amounting to twenty and 68-100 dollars; which were a lien and charge against said land at the time the defendants, Elsberry and Goodman, secured the same, and the court finds that the real consideration of the purchase of said lands by Elsberry and Goodman from Welch was the promise and agreement by them to pay off and discharge the debt secured by said county school fund mortgage and interest and the levee taxes and State and county taxes aforesaid and that said incumbrance was all the incumbrance intended by said Welch and said Goodman and Elsberry to be assumed by them as the consideration for said conveyance; that said Elsberry and Goodman had no actual knowledge of the existence of the notes and deeds of trust hereinbefore described held by plaintiff, but that prior to the purchase by them of the lands aforesaid and while said William W. Reid was the owner of said notes and deed of trust, the defendants, Elsberry and Goodman, had a conversation with said Reid, who was then the presiding judge of the county court of Lincoln county, Missouri, and asked him to take steps to have the school fund mortgage aforesaid foreclosed so that they, said defendants, would be released from their obligation by reason of their said security on said notes or bond. That said Reid told them that he had been trying to sell the said lands but had not received an offer for a sufficient amount to pay said school fund mortgage and the levee and other taxes due thereon, and that said Reid suggested to them that they Elsberry and Goodman, buy such lands so that they would not lose anything by reason of being securities on said school fund mortgage and the taxes aforesaid, which were a lien on said

land. And that in said conversation, the said Reid made no mention of the fact that he, the said Reid, had a claim on or to said lands, or any indebtedness thereon secured by a deed of trust or otherwise; that said Elsberry and Goodman relied and acted on said suggestion, advice and conduct of said William W. Reid in the purchase of said lands as aforesaid.

"The court further finds that on the — day of November, 1908, said defendants, Elsberry and Goodman, paid off and discharged said State and county taxes, amounting to twenty and 68-100 dollars, levee and drainage taxes, amounting to two hundred four dollars; and interest on the said school fund mortgage bond, amounting to five hundred sixty-four and 60-100 dollars, leaving the principal of said bond, seven hundred dollars, unpaid.

"It is therefore ordered, adjudged and decreed by the court that the said deed of trust be foreclosed and the land hereinbefore described be sold by the sheriff of Lincoln county, Missouri, to the highest bidder, for cash, and that out of the proceeds of said sale, he pay first the costs and expense of said sale and of this suit.

"Second: That out of the balance of the proceeds of said sale, he repay to the defendants, Elsberry and Goodman, the sum of seven hundred eighty-four and 28-100 dollars.

"Third: That the remaining proceeds be applied to the payment to plaintiff of the debt secured by the deed of trust first aforesaid in the sum of five thousand, four hundred, eighty-four and 43-100 dollars. That he make due report of his doings and acts in the premises to this court."

Judgment was entered accordingly, and after unsuccessfully moving for a new trial, and saving exception to the overruling of said motion, plaintiff has duly prosecuted his appeal to this court.

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ALLEN, J. (after stating the facts).—We are not concerned with the question of the consideration for the notes involved in this suit. The trial court found that the notes were valid as between Welch, the maker thereof, and Reid, the bankrupt, and that they had not been paid; the court ordered the deed of trust foreclosed and the land sold, subject of course to the prior incumbrance of the school fund mortgage. However, the finding of the lower court was, in effect, that the trustee in bankruptcy of Reid should be estopped from asserting any claim upon these notes as against the defendants Elsberry and Goodman, and that the latter, out of the proceeds of the sale of the land, should be reimbursed for their expenditures in paying off liens and incumbrances thereon. This seems to be in accordance with the clear equities of the case.

That the trustee in bankruptcy stands in the shoes of the bankrupt, so far as the right to enforce the collection of these notes is concerned, must be conceded. The trustee is vested “by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt.” [Bankruptcy Act, sec. 70a.] He takes the title that the bankrupt had at the date of adjudication, not as an innocent purchaser, but subject to all valid claims, liens and equities. [Loveland on Bankruptcy (1912), sec. 371.] The trustee’s rights in the premises rise no higher than those of the bankrupt, and if the bankrupt by reason of any conduct on his part should in equity be estopped from asserting any claim against defendants Elsberry and Goodman, such estoppel may be invoked against his trustee in bankruptcy in like manner as it might have been invoked against the bankrupt himself.

But it is earnestly insisted by counsel for the appellant that the conduct of Reid was not such as to work an estoppel, for the reason that there was no fraud intended on his part, and no false representation or fraudulent concealment of any material fact, with

intent that these defendants should act thereupon; and for the further reason that the deed of trust was of record and these defendants had constructive notice thereof.

The evidence is convincing that these defendants, in the absence of Welch, and knowing the relations that had existed between him and Reid, and for the reason also that the latter was a member of the county court, conferred with Reid in regard to protecting themselves from liability as sureties on the school fund mortgage in favor of the county; that Reid discussed the matter with them and undertook to sell the land in order to relieve them from responsibility, and failing in this, that he told these defendants, in substance, that the best thing for them to do was to buy the land for their own protection. During all of this time no mention whatever was made by Reid of these notes and the deed of trust securing the same, but on the contrary his acts and conduct in the matter were altogether inconsistent with the existence of any such lien or incumbrance on the land, and were such as may have well put these defendants off their guard, and caused them to refrain from an examination of the records or from availing themselves of other sources of information. Clearly, under the equitable doctrine of estoppel *in pais*, Reid should not now be heard to assert any claim upon these notes as against the defendants Elsberry and Goodman, or any lien upon the land to their prejudice; and his trustee in bankruptcy has no greater right than he would have had in the premises.

It is said that to constitute an estoppel *in pais* there must have been (1) a false representation or a concealment of material facts, (2) made with the knowledge of such facts, (3) to one who was ignorant of the truth of the matter, (4) with the intention that he should act upon it, and (5) that he was induced to do so. [Bigelow on Estoppel (1890), p. 570; Blodgett v. Perry, 97 Mo. 263, 10 S. W. 891; Shields v. McClain,

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75 Mo. App. 636.] However an estoppel may arise from mere silence, or passive conduct on the part of one who has knowledge of the facts and whose duty it is to speak, where such silence or conduct is misleading. [Pickard v. Sears, 6 Ad. & E. 469; Gregg v. Wells, 10 Ad. & E. 90; Bigelow on Estoppel (1890), pp. 583-588; Withers v. Railroad, 226 Mo. 399, 126 S. W. 432; Guffey v. O'Reiley, 88 Mo. 418; Pelkington v. Insurance Co., 55 Mo. l. c. 178.]

It is clear that there must be something equivalent to a representation; but under the authorities it is equally clear that silence or concealment, under circumstances where one ought to speak and to reveal the truth, is regarded as being in effect a representation. On this question Mr. Bigelow says: "A representation may arise not only by way of concealment of part of the truth in regard to a whole fact, as we have seen; more than that, from total but *misleading* silence with knowledge, or passive conduct joined with a duty to speak, an estoppel will arise. The case must be such that it would be fair to interpret the silence into a declaration of the party that he has, e. g., no interest in the subject of the transaction. Indeed, silence, when resulting in an estoppel, may not improperly be said to have left something like a representation on the mind; for the case is this: A negotiation is going on, and the mind receives the facts brought out, and receives those facts only. Hence, everything inconsistent with them, relating to the rights of others present as well as to those of the party with whom the negotiation is going on is excluded. The effect may be considered negative, but the mind sees and may actually regard that negative; indeed, that, in large part, is the meaning of calculating the advantages of the proposal." [Bigelow on Estoppel (1890), pp. 583, 584.]

In Guffey v. O'Reiley, supra, the court said: "Upon this evidence the point to be determined is

whether an equitable estoppel has arisen in this cause. Lord DENMAN, who had delivered the opinion in the earlier case of *Pickard v. Sears*, 6 Ad. & E., 469, when he came to deliver the opinion in the later one of *Gregg v. Wells*, 10 Ad. & E. 98, stated that the doctrine in the former case might be stated even more broadly than it was there laid down: ‘A party,’ said he, ‘who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.’ In *Niven v. Belknap*, 2 Johns. 588, which was a bill in equity regarding land, the court said: ‘There is an implied, as well as an express assent; as where a man who has a title, and knows of it, stands by and either encourages or does not forbid the purchase, he and all claiming under him shall be bound by such purchase. [1 Fonb. 161.] It is very justly and forcibly observed by a writer on this subject (Roberts, 130), that there is a negative fraud in imposing a false apprehension on another by silence, where silence is treacherously expressive. In equity, therefore, where a man has been silent, when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent.’ Treating on this subject, Judge STORY says: ‘In many cases a man may innocently be silent, for, as has often been observed, “*Aliud est tacere, aliud celare.*” But in other cases a man is bound to speak out, and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction;’ and after giving instances of a man standing by and encouraging, or not forbidding, a sale of his property, or sees another person selling his land as grantor, and signs the deed made as a witness, the learned author, after stating the invalidating effect of such conduct on the title of the party guilty thereof, concludes by saying: ‘For

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in cases where one of two innocent persons must suffer a loss, and *a fortiori*, in cases where one has misled the other, he who is the cause or occasion of that confidence by which the loss has been caused or occasioned ought to bear it. Indeed, cases of this sort are viewed with so much disfavor by courts of equity, that neither infancy nor coverture will constitute any excuse for the party guilty of the concealment or misrepresentation.' [1 Story, Eq. Jur. (13 Ed.), secs. 385, 387.]'" And this language is quoted approvingly in Withers v. Railroad, 226 Mo. l. c. 339, 401, 126 S. W. 432.

There is no doubt that Reid had knowledge of the fact of the existence of these notes and the deed of trust securing them. It is wholly immaterial whether he actually had them in mind or not at the time of his conversation with these defendants prior to their purchasing the land. His knowledge of their existence will be presumed, and his failure, under the circumstances, to disclose the fact of their existence, even though it be through negligence on his part, is tantamount to an active concealment in that it will raise an estoppel. [Guffey v. O'Riley, *supra*; Withers v. Railroad, *supra*; see also, Bigelow on Estoppel (1890), pp. 612-614.]

There can be no doubt that defendants Elsberry and Goodman were ignorant of the fact of the existence of the notes and the deed of trust, prior to their purchase of the land. And it may well be inferred from the evidence that they relied upon the conversations had with Reid and the impressions gained thereby, knowing the latter's close business relationship with Welch, who held the legal title to the property and who had removed from the State, and assuming, as they evidently did, that Reid had complete knowledge of the condition of the title to the property and that it would be safe for them to act in the premises without availing themselves of other sources of information. They may well thereby have been put off their guard, and,

relying upon the knowledge thus gained and the impressions thereby received, refrained from examining the records as to the title to the property.

Although one's title to real property is of record, nevertheless an estoppel will arise against him, if by representations he has misled another with respect thereto, whereby the latter has been induced to act to his injury. [Clark v. Edgar, 84 Mo. 106; Bailey v. Smock, 61 Mo. 213; Keifer v. Roger, 19 Minn. 32; David v. Park, 103 Mass. 501.] The principle is said to be that "a clear and positive representation of the facts may be acted upon, though the person to whom it was made had ample means of knowing the fact—indeed though he had legal notice thereof, as distinguished from knowledge, as e. g., by the due registration of an instrument." [Bigelow on Estoppel (1890), p. 627.] There is, however, no distinction in principle between a case in which an actual representation has been made, and one where silence or culpable negligence of a party is, under the circumstances of the case, tantamount to an actual representation. And in such case the silent or guilty party will be likewise estopped, even though his title be a matter of record. [Olden v. Hendrick, 100 Mo. l. c. 538, 13 S. W. 821; Evans v. Forstall et al., 58 Miss. 31.] "Mere standing by in silence will not bar one from asserting a title to land, which has been spread upon the public records, so long as no act is done to mislead the other party. [Big. on Estoppel (5 Ed.), 594.] But the very statement of the rule shows that the fact that the title is of record is no justification for an act which does mislead the other party." [Olden v. Hendrick, *supta.*]

In order to raise the estoppel, it is said that the representation must have been made with the intention, either actually or reasonably to be inferred by the person to whom it was made, that it should be acted upon. It has been held however that there need

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be no intention to deceive. [Galbraith v. Lunsford, 87 Tenn. 89, 9 S. W. 365; Raley v. Williams, 73 Mo. 310.] And while it is frequently said that fraud is an essential element of estoppel, this must be taken to mean fraud either actual or constructive. "The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up." [Bales v. Perry, 51 Mo. l. c. 453; Hequembourg v. Edward, 155 Mo. l. c. 522, 56 S. W. 490.] Indeed it is said that "negligence when naturally and directly tending to indicate intention will therefore have the same effect in creating the estoppel as actual intention." [Bigelow on Estoppel (1890), p. 631 and cases there cited.] In the case before us it is clear that Reid intended that the defendants Elsberry and Goodman should act upon the theory that the land in question was subject only to incumbrances and liens other than the deed of trust. It is not necessary therefore that Reid actually intended to deceive or defraud these defendants.

It is clear that the defendants Elsberry and Goodman acted upon what we may call the representations of Reid with respect to the property. The latter had endeavored to sell the property at a price sufficient to pay the incumbrance against the same, other than the deed of trust. Failing in this, in course of conversation with them he advised that they purchase the land for their own protection. Relying upon what they believed to be the true state of facts, and induced by Reid's conversations with them, they purchased the property. So that there can be no question but that these defendants were led to act as they did by Reid's conduct in the premises.

It is unnecessary to discuss at length the other questions raised. It is insisted by appellant that by the language of the clause in question, in the deed from Welch to Elsberry and Goodman, the latter assumed all incumbrances on the land, and that this cannot be

varied or modified by parol. While parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument, nevertheless the writing "should be read in the light of surrounding circumstances, in order the more perfectly to understand and explain the intent and meaning of the parties." [Laclede Const. Co. v. Tie Co., 185 Mo., l. c. 62, 84 S. W. 76, 87.] It plainly appears from the facts and circumstances in evidence that the parties really intended for the grantees in this deed to assume merely the school fund mortgage with interest thereon and the levee and other taxes and interest and penalties on the same. The defendants Elsberry and Goodman knew of no other incumbrances and it is perfectly clear that they thought that these were the only liens to which the land was subject, and that this was all that they were assuming. Welch testified that he wrote this clause in the deed after it had been sent to him for execution, not having in mind the deed of trust, but for the reason that the deed would otherwise, as he said, leave him liable for the mortgage and taxes which the defendants Elsberry and Goodman were to pay. Under the circumstances of the case it would manifestly be inequitable and unconscionable to hold that these defendants assumed the payment of the indebtedness secured by the deed of trust, and it would be clearly contrary to the actual intention of the parties. And it is not a case where anyone has relied upon this clause in the deed, or acted thereupon to his injury and damage. On the contrary the action is by the representative of one whose conduct was such as to estop him from enforcing any claim against these defendants arising upon their supposed assumption of the indebtedness secured by this deed of trust.

The decree properly requires that the defendants Elsberry and Goodman be reimbursed for the moneys expended by them in paying the interest on the school fund mortgage, and the levee and other taxes. Their

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right to be subrogated to the rights of the original payees of this indebtedness is perfectly clear; and the estoppel here raised against the plaintiff altogether precludes him from asserting any lien upon the land to the prejudice of these defendants, or any right to the proceeds of the sale thereof until they have been fully reimbursed. For this reason, also, it is unnecessary to notice the point that has been raised to the effect that the deed of trust was a lien prior to the levee taxes. The plaintiff being estopped from asserting the lien of the deed of trust as against these defendants, we are in no wise concerned with this question of priority as between the deed of trust and the levee taxes.

Neither are we concerned with the failure of the lower court by its decree to reform the deed from Welch to Elsberry and Goodman. The latter are not here appealing from that decree, and in view of the estoppel against plaintiff no reformation of the deed is necessary in order that complete equity may be done between the parties to this record.

It is also urged that the defendants Elsberry and Goodman had possession of the land in question for two or three years, and received some two hundred or two hundred and fifty dollars from crops grown thereon and cord wood cut therefrom, for which they should be made to account. The evidence however discloses that this was done under a lease from Welch to them, and that they had settled with Welch therefor long prior to the transaction here in question. Plaintiff, being estopped to assert any lien upon the land as against these defendants, is in no position to raise this question.

The decree of the lower court, so far as it goes, is manifestly correct. No personal judgment can be had against defendant Welch, as he was a nonresident of the State, and personal service was not had upon him in this State. The judgment of the lower court,

however, should go farther than it does, in that judgment should be entered for the defendants Elsberry and Goodman upon plaintiff's demand for a deficiency judgment against them, in order that this issue may thereby be definitely concluded.

For the reasons given above the judgment of the circuit court should be affirmed, and the cause remanded with directions to that court to add thereto its further judgment in favor of the defendants Elsberry and Goodman upon plaintiff's demand for a personal judgment against them; and the costs of this appeal should be taxed against the appellant. It is so ordered. *Reynolds, P. J., and Norton, J., concur.*

ADRIAN U. FIESTER, Respondent, v. WILLIAM S. DROZDA, Appellant.

St. Louis Court of Appeals, March 1, 1913.

1. **GUARANTY: Construction of Contract.** An instrument providing that, if a lessee failed to pay the rent specified in a lease or if the lease was forfeited, the person signing guaranteed the payment of rent to the lessor for three months from the date it was due and unpaid or the date the lease was forfeited, was a contract of guaranty rather than suretyship.
2. **—: —: Liability of Guarantor.** The terms of a contract of guaranty are to be strictly construed and the liability of the guarantor cannot be extended by implication, but the contract must nevertheless be construed so as to give effect to the intent of the parties.
3. **—: Subsequent Contract: Construction: Evidence.** Defendant agreed, by a written instrument, to guarantee to a lessor the payment of rent for three months from the date it was due, in the event the lessee failed to pay it. The lessee continued in possession until February 16, 1910, when he surrendered it to parties to whom he had assigned the lease on January 10, 1910. The lessor gave his consent to the assignment on condition that defendant, as guarantor, remain "fully bound by all the obligations imposed on him in said lease." By a

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written instrument executed February 16, 1910, defendant agreed to remain bound by his guaranty to plaintiff and by all the conditions of the written consent of plaintiff to the assignment of the lease "in all respects as if the assignments had not been made and said consent had not been granted." In an action by the lessor on the latter instrument, for three months' rent in arrear by the assignees, held that said instrument was not a new contract of guaranty for the payment of rent by the assignees, separate from and independent of the original undertaking of the defendant, but was merely a formal written consent of defendant to the assignment of the lease, and that defendant's obligation was limited to the original guaranty; and hence defendant, when sued on the guaranty, was entitled to prove a payment to plaintiff of rent in arrear for three months prior to the assignment of the lease, in discharge of his obligation.

4. ____: ____: ____: ____: _____. In such case, the fact that defendant's obligation was renewed subsequent to the time he claims it was discharged by virtue of the payment of three months rent in arrear would not negative defendant's claim of extinguishment nor have the effect of causing the instrument of February 16 to be construed as a new contract of guaranty.
5. ____: ____: ____: _____. In such case, the fact that defendant paid a small part of the rent for a month subsequent to the assignment would not have the effect of causing the instrument of February 16 to be construed as a new contract of guaranty; it not appearing whether defendant made such payment in discharge of what he conceived to be his obligation remaining on his original undertaking or in recognition of his liability on the instrument of February 16 as a new and separate guaranty.

Appeal from St. Louis City Circuit Court.—*Hon. W. B. Homer, Judge.*

REVERSED AND REMANDED.

A. R. Russell for appellant.

A surety has the right to stand upon the letter of his obligation and his liability cannot be extended by construction or implication. *Life Ins. Co. v. McDearmon*, 133 Mo. App. 671; *State ex rel. v. Delaney*, 122 Mo. App. 234; *Martin v. Whites*, 128 Mo. App. 117; *Reissaus v. Whites*, 128 Mo. App. 135; *Mansom v. Cole-*

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man, 86 Mo. App. 18; State ex rel. v. Weeks, 92 Mo. App. 359; State ex rel. v. Hendricks, 88 Mo. App. 560; Burnes Estate v. Fid. & Dep. Co., 96 Mo. App. 467.

George W. Lubke and George W. Lubke, Jr., for respondent.

ALLEN, J.—This is an action against defendant as guarantor upon a lease. On March 27, 1909, the plaintiff leased certain premises in the city of St. Louis to one Charles Howell for a term of four years, at a rental of \$315 per month, payable monthly in advance. The defendant became a guarantor for the lessee Howell, by the following writing, signed by him, upon said lease, viz.:

“In case said lessee fails to pay the rental specified in the foregoing lease, or said lease is forfeited for any reason, then I hereby guarantee the payment of rent to said lessor for the premises herein leased to said Charles Howell, for the term of three months from the date such rent is due and unpaid or the date said lease is forfeited.

“St. Louis, Mo., March 27, 1909.

“WILLIAM S. DROZDA. (Seal)”

The lessee, Howell, went into possession of the leased premises, and continued in possession until February 16, 1910. On January 10, 1910, Howell executed an assignment of all his right, title and interest, as lessee, in and to the lease, to one Sam Gross and one Leonhard Offermann. On February 12, 1910, the defendant made a written request upon plaintiff, the lessor, to consent to said assignment by Howell to Gross and Offermann, for the remainder of the term of the lease; and on the same date the plaintiff executed a written consent thereto, stipulating however as one of the conditions therein, ‘that the said W. S. Drozda, as guarantor and surety remains fully bound by all the

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obligations imposed on him in said lease." Thereupon, on February 16, 1910, the defendant Drozda executed the following writing:

"I, W. S. Drozda, surety and guarantor for Charles Howell, lessee, in and of his obligation under the aforesaid and hereto attached lease, do hereby accept the terms and conditions of the foregoing consent to the assignment to Sam Gross and Leonhard Offermann by Charles Howell, lessee, of his interest in said lease, and in consideration of the sum of one dollar to me paid by Adrain U. Fiester, do also hereby consent to the foregoing assignment of said lease and do agree and acknowledge that I am and do remain bound as fully by my guarantee to said Adrain U. Fiester, and all the conditions of said consent in all respects as if said assignment had not been made and said consent had not been granted.

W. S. DROZDA. (Seal)"

St. Louis, Mo., Feb. 16, 1910.

It is averred by the petition that the new lessees, Gross and Offermann, failed to pay the rent for the premises for the months of June, July and August, 1910, aggregating \$945, and that the defendant also refused to pay the same; and judgment is prayed against the defendant for said rental for these three months.

The answer is a general denial, coupled with the averment that the original lessee, Howell, and the new lessees, Gross and Offermann, failed and neglected to pay the rent of said premises for the months of February, March, April and May, 1910, amounting to \$1260; that the defendant, in pursuance of his undertaking and on default of said lessees, paid plaintiff the said sum of \$1260; whereby all of defendant's obligation, upon his undertaking in the premises, was fully discharged. The reply was a general denial of the new matter in the answer.

The cause was heard before the court and a jury. Upon the trial it was shown, on behalf of plaintiff, that the new lessees had failed to pay the rent for the months of June, July and August, and that plaintiff had, by landlord's summons before a justice of the peace, obtained possession of the premises on September 1, 1910. One Wissmann, a witness for plaintiff, and who was a collector for the real estate firm having charge of the property for plaintiff, testified that the rent for the months of December, 1909 and January and February, 1910 had been paid by checks of the defendant. He identified a rent receipt dated December 17, 1909, and a check of defendant attached thereto for \$315, bearing the same date and payable to J. E. Kaime and Brother, plaintiff's agents in charge of the property. He likewise identified a similar receipt, and a like check, for the same amount, dated January 13, 1910; also a similar receipt, and a like check, for the same amount, dated February 9, 1910. It appears that in these receipts, after the printed words "received payment," the words, "From W. S. Drozda" were written in. The witness stated that he had written these words on the receipts at the request of the defendant, the latter saying that he had had some trouble with Howell, and "was going to wind up" with him and wanted to be able to produce the receipts to show that he had made these payments.

On redirect examination Wissmann testified that he first went to Howell for these rents; that Howell at first wanted to make partial payments on the rent, which the witness would not accept; that Howell thereupon said that he would make payments to defendant Drozda every week or every two weeks, and that the latter would pay the rent in full. The witness stated that he then went to defendant for the rent. This witness also identified a check of defendant for \$40, of date June 13, 1910, being for a portion of the rent for the month of May, 1910.

On behalf of defendant it was sought to introduce in evidence the rent receipts for December, 1909, and January and February, 1910, together with the above mentioned checks of defendant, of date respectively December 17, 1909, January 13, 1910, February 9, 1910, in an effort to show that these payments were made by defendant himself as guarantor upon the lease. The plaintiff objected to the introduction of these instruments, and to any testimony concerning the same, upon the ground that defendant had, on February 16, 1910, renewed his guaranty, so as to become guarantor for the new lessees, Gross and Offermann, to the same extent that he had originally been liable for Howell; and that therefore any payments of rent that defendant had made prior to February 16, 1910, was wholly immaterial in this action. These objections were sustained by the court, to which rulings the defendant duly excepted. The court however admitted in evidence the check of defendant, of date June 13, 1910, for the sum of \$40, being for a portion of the rent for the month of May, 1910.

On account of the adverse rulings of the court respecting the admission of defendant's evidence, the defendant offered no further testimony. Thereupon the court peremptorily instructed the jury to return a verdict in favor of plaintiff for \$945, less the \$40 paid by defendant upon the rent for May, 1910, leaving a balance of \$905, with interest thereon from the date of the commencement of the suit. In obedience to said instruction, the jury thereupon returned a verdict for \$935.50. Judgment was rendered accordingly, and the defendant appealed.

The court excluded the receipts and checks offered by defendant to show payments of rent by him prior to February 16, 1910, and defendant's testimony concerning the same, upon the theory that the defendant had on the last mentioned date entered into a new

contract of guaranty whereby he had guaranteed the payment of rent by the new lessees, in like manner and to the same extent that he had in his original undertaking. The appellant urges that by the undertaking of defendant of February 16, 1910, no new contract of guaranty was made, but that thereby the original contract was merely continued in existence; that is to say, that the defendant remained liable to the extent only that he would have been had the assignment of the lease not been made.

The undertaking of defendant is one of guaranty, rather than of suretyship (*Rieger v. Royal Brewing Company*, 106 Mo. App. 513, 80 S. W. 969; *Perry v. Barrett*, 18 Mo. App. 140; *Virden v. Ellsworth*, 15 Ind. 144; 20 Cyc. 1400; 12 Am. & Eng. Ency. (2 Ed.), 1130); but the distinction is not important here. The terms of the contract of guaranty are to be strictly construed, and the liability of the guarantor cannot be extended by implication, but the contract must be construed so as to give effect to the intention of the parties. [*Shine v. Central Savings Bank*, 70 Mo. 524; *Mitchell v. Railton*, 45 Mo. App. 273; *Kansas City v. Youmans*, 213 Mo. 151, 165, 112 S. W. 225.] The rule does not preclude the courts, when construing a contract of guaranty, from applying the rules and tests applied to other contracts, in undertaking to determine the real meaning of the language used. [*Kansas City v. Youmans*, *supra*.]

By the terms of the original undertaking of defendant, he guaranteed the payment of the rent for the premises for a term of three months from the date such rent became due and remained unpaid, or the date of the forfeiture of the lease. The record shows that defendant made a written request upon plaintiff that the latter consent to the assignment by Howell to Gross and Offermann. Plaintiff did consent to this assignment, upon condition that the defendant remain *fully bound by all obligations imposed on him in said*

lease. By the instrument of writing of February 16, 1910, executed by defendant, the latter agreed to remain bound by his guaranty to plaintiff, and by all of the conditions of this written consent of plaintiff to the assignment of the lease, *in all respects as if said assignment had not been made and said consent had not been granted*. After careful consideration of the question, we are unable to agree with the view of the learned trial judge that this constituted a new guaranty by defendant for the payment of the rentals by the new lessees, separate from and independent of the original undertaking of defendant. On the contrary, we think that the intention of the parties, gathered from the language used in the writing of February 16, 1910, together with that of the written consent of plaintiff therein referred to, appears to be that the obligation of defendant was not to be extended beyond that fixed by his original guaranty. In fact the plaintiff gave his consent to the assignment upon condition that the defendant remain bound by the obligations *imposed on him in said lease*, without undertaking evidently to impose upon him any new obligation. The defendant, on the other hand, agreed, in effect, that his original obligation was to remain in full force and effect, regardless of the assignment of the lease, *as if said assignment had not been made* and plaintiff's consent thereto *had not been granted*. Defendant, of course, would have been released upon his contract of guaranty, had the plaintiff consented to an assignment of the lease and such assignment had been made to the new lessees, without the consent of the defendant. And it appears that the instrument of February 16, 1910 was merely a formal written consent of defendant to the assignment of the lease, in order that defendant be not released from his original obligation, and not that it was intended thereby to create a new, separate and independent guaranty on his part. If this be true, then defendant was at liberty to show that

he had discharged part or all of his obligation as guarantor on the lease.

Respondent says that under the evidence adduced by plaintiff, which was uncontradicted, plaintiff was entitled to have the jury peremptorily instructed to return a verdict in his favor. This would doubtless be true upon the evidence actually admitted. However, defendant's complaint is that he was not permitted to show that he had, as guarantor, made certain payments of rentals in discharge, partial or total, of his obligation.

It is also contended by respondent that the renewal of defendant's obligation, on February 16, 1910, negatived all claim that, by his previous payments of rent for Howell, he had extinguished his obligation as guarantor. This, however, does not necessarily follow. The agreement to remain bound by the original obligation may appear to have been a useless thing, if in fact defendant had discharged himself from all liability thereon; nevertheless, there being no evidence that there was, at the time, any consideration or discussion of the question as to whether defendant's original liability had been discharged, in whole or in part, and the language of the agreement itself being such as to imply no new or additional obligation, we do not feel at liberty to extend the obligation of defendant beyond the clear import of the language used.

Respondent also urges that by the payment of a portion of the May rent for the new lessees, defendant recognized his liability as guarantor for these lessees, as upon a new contract of guaranty. This payment, however, by defendant of a portion of the May rent is not a controlling factor in determining that question. It does not appear whether defendant made this payment in discharge of what he conceived to be his obligation remaining upon his original undertaking or in recognition of his liability upon the instrument of February 16, 1910, as a new and separate guaranty.

The mere payment of a small part of the May rent would not justify us in construing the writing in question beyond the plain terms of the instrument itself. And by the language of the instrument we think it appears that it was intended merely to preserve the *status quo*.

It is true that plaintiff's testimony went to show that the payments made by defendant for rent prior to the assignment of the lease, were really made by Howell through defendant as his agent, and not by defendant on his guaranty. In our opinion, however, the learned trial judge erred in not permitting the defendant to testify concerning these payments. With these receipts and checks in evidence, and defendant's testimony heard concerning these payments, it would then be a question for the jury as to whether the payments were made as agent for the lessee, or by the defendant as guarantor in discharge of his obligation as such.

It is true that the answer avers that the defendant, as guarantor, paid the rent for the months of February, March, April and May, 1910, while the offers of proof made by defendant show that the payments sought to be proved were for the months of December, January and February, and a portion of the May rent. Defendant, however, during the progress of the trial asked leave to amend his answer, which request was not passed upon by the court, evidently because of the view taken by the court that defendant was not entitled to show any payments made by him as guarantor prior to February 16, 1910.

The judgment of the circuit court is reversed and the cause remanded. *Reynolds, P. J., and Norton, J.* concur.

PHILIP GRUNER & BROS. LUMBER COMPANY,
Appellant, v. HARTSHORN-BARBER REALTY
AND BUILDING COMPANY et al., Respondents.

St. Louis Court of Appeals, March 1, 1913.

1. **MECHANICS' LIENS: Right to Amend Statement.** A person who has filed a mechanic's lien statement, in accordance with Sec. 8217, R. S. 1909, may file an amended statement within the time limited in that section.
2. **—: Right to Commence New Action.** The plaintiff may dismiss an action to enforce a mechanic's lien and commence a new action within the time limited in Sec. 8228, R. S. 1909.
3. **APPELLATE PRACTICE: Controlling Decisions of Supreme Court.** The last previous ruling of the Supreme Court on any question of law or equity is controlling upon the Courts of Appeals, and it is their duty to follow it.
4. **MECHANICS' LIENS: Statement: "Lien" Defined.** The lien statement in a mechanic's lien proceeding is not the lien; the latter being the charge upon the property arising by operation of law upon the filing of a proper lien statement within the required time.
5. **—: Effect of Amending Statement.** A lienor, having filed a lien statement for a mechanic's lien and commenced suit to enforce it, does not abandon the lien arising therefrom by operation of law by reason of thereafter filing an amended statement.
6. **—: Construction of Statute.** The mechanics' lien law should be liberally construed.
7. **PLEADING: Amendments: Construction of Statute.** The provisions of the Code providing for amendments to pleadings should be liberally construed.
8. **MECHANICS' LIENS: Right to Amend Petition: Pleading.** Great liberality is allowed in amending petitions in actions to enforce mechanics' liens.
9. **PLEADING: Amendments: Doctrine of "Relation."** The general rule is, that an amended petition relates back to the institution of the suit; but this doctrine is a mere fiction of the law and should be resorted to only for promoting justice and the lawful intention of the parties, by giving effect to acts or instruments which, without it, would be invalid.

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10. ——: **Departure: Demurrer.** An objection that an amended petition is a departure from the original petition cannot be reached by demurrer.
11. **MECHANICS' LIENS: Effect of Amending Statement and Petition.** A materialman, after filing a statement for a mechanic's lien and instituting suit to enforce the lien, may, within the time limited in Art. 3, Chap. 34, R. S. 1909, file a second lien statement containing an amended description of the property, and amend his petition to conform thereto; the filing of the second statement not being an abandonment of the lien which arose by operation of law upon the filing of the first statement, and the amended petition, although relating back to the institution of the suit, not counting upon a new cause of action nor seeking to enforce a new or a different lien.
12. **PLEADING: Demurrer: Scope.** Matters not appearing on the face of the petition cannot be reached by demurrer.
13. **MECHANICS' LIENS: Pleading: Scope of Demurrer.** An objection that the notice of a mechanic's lien required by Sec. 8231, R. S. 1909, incorrectly described the property cannot be reached by demurrer where there is nothing on the face of the petition to show that fact.
14. ——: **Amending Statement: Notice.** Where an amended lien statement was filed in a proceeding by a materialman for a mechanic's lien and the petition was amended to conform thereto, a notice given as provided by Sec. 8231, R. S. 1009, prior to the filing of the first statement was all that was required, and it was not necessary to give another notice prior to the filing of the amended statement.
15. ——: ——: ——: **Sufficiency of Description.** In a proceeding by a materialman to enforce a mechanic's lien, the original statement filed described the property as follows: "Lot 21 and the northern 18 ft. of lot 22 of Randall & State Savings Assn's subdivision in block 1899 in the city of St. Louis, fronting 38 ft. on the east line of Baldwin street, by a depth eastwardly of 128 ft. 6 in. to an alley." An amended lien statement filed described the property as follows: "Lot 21 and lot 22 of Randall and State Savings Assn. subdivision in block 1899 of the city of St. Louis, which said lots are contiguous and front 40 ft. on the east line of Baldwin street by a depth extending eastwardly of 128 ft. 6 in. to an alley." The notice given, as required by Sec. 8231, R. S. 1909, contained the description set out in the original statement, and no notice was given prior to the filing of the amended statement. *Held*, that the notice was sufficient to point out and identify the property in question, which is all that is required.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

REVERSED AND REMANDED (with directions).

Leighton Shields, Wm. R. Orthwein, P. H. Cullen, Thomas T. Fauntleroy and Shepard Barclay for appellant.

(1) Where a statement for a mechanic's lien is defective, by reason (as in this case) of an error in describing the real property, the lienor may, within the statutory period, file another statement for lien upon the same account with a correct description of the property remedying the original defect. Plaintiff had a right to file its second statement for lien of August 10, 1912, amending the description of the first. *Burnett v. Clooney*, 67 Mo. App. 664; 68 Mo. App. 146; *Hannon v. Gibson*, 14 Mo. App. 36; *Camden v. Steamboat*, 6 Mo. 381; *Lumber Co. v. Wright*, 114 Mo. 326. (2) The doctrine of "relation" is a "fiction of law" to support and maintain just claims, and not to destroy them. 24 Am. & Eng. Ency. L. (2 Ed.), 275; *Lilly v. Tobein*, 103 Mo. 490; *Land Co. v. Franks*, 156 Mo. 690; *Wheeler v. Milling Co.*, 73 Mo. App. 677; *DeWitt v. Smith*, 63 Mo. 266; *Ward v. Davidson*, 89 Mo. 445; *Reyburn v. Mitchell*, 106 Mo. 379; *Cohn v. Souders*, 175 Mo. 467; *Nave v. Adams*, 107 Mo. 421. (3) In a suit to enforce a special tax bill (which is entirely a lien and not a personal suit) it has been held that, when an invalid tax bill was replaced by a second, a suit on the first may proceed by an amended petition on the amended or second tax bill and a valid judgment of lien be entered thereon, without the useless formality of dismissing the first suit and then beginning a new suit on the amended tax bill. That decision on principle involves the identical features of the case at bar. *Galbreath v. Newton*, 45 Mo. App. 312. (4) The second amended petition was an abandonment of the

old petition, and so far as the amended lien statement was concerned was in effect a new suit. *Young v. Woolfolk*, 33 Mo. 110; *Ticknor v. Voorhis*, 46 Mo. 110. (5) The last lien statement was different from the first in giving a correct and true description of the property. There is no ground to assert that the claims are the same or two liens filed. The burden is on defendants on that issue and their demurrer admits the facts as alleged in the second amended petition, which show a correction in the description of the property against which the lien is sought. *Harmon v. Wirtel*, 59 Mo. App. 646; *Lumber Co. v. Wright*, 114 Mo. 326. (6) An amendment of mere description such as here appears should be allowed as a matter of course as part of the customary procedure under the code. *Hannon v. Gibson*, 14 Mo. App. 36; *Newman v. Ry.*, 19 Mo. App. 100; *Calleghan v. McMahan*, 33 Mo. 111; *Sage v. Tucker*, 51 Mo. App. 336; *Reyburn v. Mitchell*, 106 Mo. 379; 13 Ency. Pl. and Pr., p. 1009. (7) It has long been the policy of the law of Missouri to construe the mechanics' lien law reasonably, as remedial legislation to accomplish just results, as intended by its spirit and evident purpose. *Crane Co. v. Real Estate Co.*, 121 Mo. App. 225; *DeWitt v. Smith*, 63 Mo. 266; *Putnam v. Ross*, 46 Mo. 337; *Hicks v. Schofield*, 121 Mo. 381; *McAdow v. Sturtevant*, 41 Mo. App. 220; *Rall Bros. v. McCrary*, 45 Mo. App. 370. (8) The decisions of our courts are in favor of a liberal exercise of the power of amendment to save limitations. A petition as a matter of law may date back in order to do justice and save a party, but the courts will not date back a petition for the sake of doing an injustice or to put a party out of court. The dating back of a petition is a fiction of the law. A petition dates as of when it is filed when necessary to support its claim. *Childs v. Railroad*, 117 Mo. 414; *Hannon v. Gibson*, 14 Mo. App. 33; *Cohn v. Saunders*, 175 Mo. 455; *Lumber Co. v. Clark*, 82 Mo. App. 225.

Boyle & Priest and Paul U. Farley for respondent.

The demurrer to plaintiff's second amended petition was properly sustained. First: Because the record shows that the action was commenced prior to the filing of the mechanics' lien account which the amended petition seeks to enforce. Second: Because, while the amended petition alleges that the statutory notice of ten days as to the filing of the first lien of May 15, 1910, was given, this essential allegation as to the lien of August 10, 1910, which is sought to be enforced does not appear. *Heltzell v. Hynes*, 35 Mo. 484; *Hewitt v. Truitt*, 23 Mo. App. 443.

ALLEN, J.—This is an action to enforce a mechanics' lien. The parties to the record are all corporations. The Warner-Jenkinson Company is alleged to be the owner of the property against which the lien is sought; and the Union Trust Company of St. Louis and the Title Guaranty Trust Company are made defendants because of a certain deed of trust alleged to have been executed by the defendant Warner-Jenkinson Company to the Union Trust Company of St. Louis, as trustee, securing notes payable to the Title Guaranty Trust Company and of which the latter company is alleged, upon information and belief, to have been the holder at the time of the institution of the suit. The defendant Hartshorn-Barber Realty & Building Company is alleged to have been the general contractor for the construction of a brick manufacturing building upon the premises in question; and it is alleged that the plaintiff, a lumber company, furnished materials to said building under contract with the defendant Hartshorn-Barber Realty & Building Company, and for which a lien is sought upon the building and the lots of ground upon which the same is situated. It is alleged that the construction of the building was begun before the execution of the deed

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of trust in question, and that therefore plaintiff's right to a lien had priority over the deed of trust.

On May 15, 1910, plaintiff filed a statement of its account and a description of the property against which the lien was sought in the office of the clerk of the circuit court of the city of St. Louis, having, ten days prior thereto, to-wit, on May 5, 1910, given notice in writing to the defendant Warner-Jenkinson Company, the owner of the premises, of its claim against the property, the amount thereof, from whom due, and of its intention to file a lien therefor.

Thereafter, to-wit, on May 28, 1910, plaintiff filed its original petition herein, in the circuit court of the city of St. Louis for the enforcement of said lien, and on June 3, 1910, a writ of summons was duly issued for all of the defendants, returnable to the October term 1910 of said court. In the said lien statement filed on said May 15, 1910, the said real estate was described as follows:

"Lot twenty-one (21) and the northern eighteen (18) feet of lot No. twenty-two (22) of Randall & State Savings Assn. subdivision in block eighteen ninety-nine (1899), in the city of St. Louis, fronting thirty-eight (38) feet on the east line of Baldwin street, by a depth eastwardly of one hundred and twenty-eight (128) feet six (6) inches to an alley."

In the original petition filed herein, said real estate was likewise described as above. Thereafter, on the 10th day of August, 1910, and within four months after the indebtedness accrued upon which plaintiff's claim to a lien is based, plaintiff filed an amended lien statement with the clerk of the circuit court of said city of St. Louis, in which no change was made in the statement of plaintiff's account, but in which the description of the property was slightly changed; said amended description thereof being as follows:

"Lot twenty-one (21) and lot No. twenty-two (22) of Randall & State Savings Assn.'s subdivisions in

block eighteen ninety-nine (1899) of the city of St. Louis, which said lots are contiguous and front forty (40) feet on the east line of Baldwin street by a depth extending eastwardly of one hundred and twenty-eight (128) feet six (6) inches to an alley."

Thereafter, on September 29, 1910, plaintiff filed its first amended petition; and on December 13, 1910, filed its second amended petition, in which said property is described as in the amended lien statement filed August 10, 1910.

It appears upon the face of plaintiff's second amended petition that "on May 15, 1910, it filed a statement of its account and a description to said property, which is recorded in the office of the clerk of the circuit court of the city of St. Louis, in vol. 7 of mechanic's lien book number 11,623, and on the 10th day of August, 1910, and within four (4) months after the aforesaid indebtedness on the aforesaid account accrued, it did amend its said statement of account and description, and did in accordance with the statute in that behalf made and provided, duly file with the clerk of the circuit court of the city of St. Louis a just and true account of the demand due it as aforesaid, after all just credits had been given, and that it so filed the same as a mechanic's lien upon said above described real estate and building, and that it then and there filed therewith, as a part thereof, a true description of said real estate and building; . . . that in pursuance of the statute in that behalf made and provided, and more than ten days prior to the filing of said lien, to-wit, on May 5, 1910, the plaintiff herein gave notice, in writing, to said defendant Warner-Jenkinson Company of its claim against said building improvements, the amount thereof, from whom due, and of its intention to file a lien therefor, which said notice was, on said last named date, duly served upon the said defendant Warner-Jenkinson Company in ac-

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cordance with the statute in that behalf made and provided."

To this second amended petition the defendants Warner-Jenkinson Company, Union Trust Company of St. Louis and the Title Guaranty Trust Company filed separate demurrers, which demurrers were by the court sustained. The plaintiff refused to plead further as to these defendants, and stood upon its second amended petition. The defendant Hartshorn-Barber Realty & Building Company made default, and judgment was entered in favor of plaintiff against this defendant for the amount of plaintiff's claim, without a lien upon the property. Judgment was entered upon the demurrers in favor of the other defendants, and plaintiff appeals.

Although the case is here upon an appeal from the action of the trial court in sustaining demurrs to plaintiff's petition and the final judgment entered upon said demurrs, it is unnecessary to set out more of the petition than we have above, for the reason that the demurrs were sustained upon the ground that when plaintiff filed its amended lien statement with the clerk of the circuit court on August 10, 1910, the latter date became the date of the filing of the lien; that the second amended petition related back to the institution of the suit, to-wit, May 28, 1910; and that therefore plaintiff was in the position of having filed its suit to enforce a lien prior to the time when the lien statement itself was filed; the date of the filing of the amended lien statement appearing upon the face of the amended petition. It is not suggested here that the petition is demurrable on any other ground, and we do not perceive that it is.

Sec. 8217, Art. 3 of chapter 34, Revised Statutes, 1909, relating to mechanic's liens provides as follows: "It shall be the duty of every original contractor within six months, and every journeyman and day laborer within sixty days and every other person seeking to

obtain the benefit of this article within four months, after the indebtedness shall have accrued, to file with the clerk of the circuit court of the proper county a just and true account of the demand due him or them after all just credits have been given, which is to be a lien upon such building or other improvements, and a true description of the property, or so near as to identify the same, upon which the lien is intended to apply. . . .”

Sec. 8231, of said article, Revised Statutes 1909, provides: “Every person except the original contractor, who may wish to avail himself of the benefit of the provisions of this article, shall give ten days’ notice before the filing of the lien, as herein required, to the owner, owners or agent, or either of them, that he holds a claim against such building or improvement, setting forth the amount and from whom the same is due. . . .”

Sec. 8228, of said article, Revised Statutes 1909, provides as follows: “All actions under this article shall be commenced within ninety days after filing the lien, and prosecuted without unnecessary delay to final judgment; and no lien shall continue to exist, by virtue of the provisions of this article, for more than ninety days after the lien shall be filed, unless within that time an action shall be instituted thereon, as hereinbefore prescribed.”

Sec. 8220, of said article, Revised Statutes, 1909, is as follows: “The pleadings, practice, process and other proceedings in cases arising under this article shall be the same as in ordinary civil actions and proceedings in circuit courts, except as herein otherwise provided. The petition, among other things, shall allege the facts necessary for securing a lien under this article, and shall contain a description of the property charged therewith.”

Plaintiff’s right to file an amended lien statement, within the statutory period after the indebtedness to

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it accrued, is beyond dispute and is not challenged here. The question is whether plaintiff may file its lien statement, institute a suit thereon to enforce the lien, and then file, within the statutory period, an amended lien statement and amend its petition to conform thereto. Unquestionably plaintiff might have dismissed the action and filed a new suit, within the required time, based upon the amended lien statement; and the lower court, as stated in its memorandum filed, thought that plaintiff should have pursued this course.

In the early case of *Mulloy v. Lawrence*, 31 Mo. 583, it was held that where one filed a lien statement and failed to bring suit to enforce the lien within ninety days, he could not thereafter file a second lien statement, although within the time allowed therefor by the statute; for, as the court said, "The plaintiff could have but one lien for the same demand."

In *Davis v. Schuler*, 38 Mo. 28, it was held that where the first lien statement filed was void, for failure to give the required notice of the filing thereof, the claimant might file another, if the prescribed time had not expired. The first lien statement filed was regarded as a nullity, and hence there were not two liens for the same claim against the same property.

In *Williams v. Railroad*, 112 Mo. 463, 20 S. W. 631, it was held that a railroad contractor was entitled to one valid lien for work done and materials furnished, and that if the first lien statement were defective, he might file another within ninety days from the completion of the work. In that case the lien statement was defective for the reason that it contained merely a lumping charge, and it was held that, since the statute called for a just and true account, which meant a fairly itemized account, the first lien statement would not support an action for a lien, and that a second one might be filed within the prescribed time. The plaintiff had instituted a suit to enforce his lien, based upon

the first lien statement; but after the filing of the second lien statement, plaintiff dismissed his original suit, and filed another based upon the amended lien statement.

In *South Missouri Lumber Company v. Wright*, 114 Mo. 326, 21 S. W. 811, the original lien statement, filed December 5, 1889, omitted a portion of the land sought to be charged with the lien. The lienor filed an amended lien statement, within the prescribed time, to-wit, December 21, 1889, correcting the description of the property. The suit to enforce the lien was not begun until after the filing of the second lien statement. The court reviewed the decisions in *Mulloy v. Lawrence*, *Davis v. Schuler* and *Williams v. Railroad*, *supra*, and said: "While the first lien was not void as in the two cases last cited, still it was defective in this, that it omitted one house and the half of one lot. Being a defective and incomplete lien statement, the plaintiff could file a perfect one at any time within the period prescribed for filing lien statements. The reason and justice of the rule allowing a second statement to be filed when the first is worthless, applies as well to a case like this where the statement omits a part of the property. *The date of filing the lien is therefore December 21, 1889.*" (The italics are ours.)

In the case before us, the trial court based its ruling on the demurrers upon the case last above cited. In its memorandum filed herein the court said: "In cases in which the first lien was absolutely void there can be no question that the lien must date from the filing of the lien paper which was valid, but where the original lien paper was not a nullity it might seem reasonable to claim that the amended lien related back to the original lien papers. However, as already stated, the Supreme Court has taken the opposite position, and in the *Wright* case, vol. 114, held in effect that by filing a second lien, the lien claimant abandoned the first and treated it as a nullity. By so hold-

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ing the decision is consistent with the court's former decisions to the effect that two liens cannot exist upon the same property for the same claim. By filing the second, the claimant simply abandons the first."

An examination, however, of the opinion in *South Missouri Lumber Company v. Wright*, *supra*, discloses that the chief defense urged in the case was that plaintiff had lost its lien because, as was said, it did not commence the suit against Wright, the owner of the property, within the time prescribed by law. This was urged for the reason that, by a clerical mistake, Wright's name was omitted in the caption of the petition, and hence his name was not inserted in the original writ. "The clerical error was corrected, by consent of the court, by inserting the name of Wright in the caption of the petition on February 15, 1890, though no formal order allowing the correction was made until the date of trial in the following November." However, on April 21, 1890, Wright entered his appearance, and later, by order of court, the original writ was amended by inserting his name. The Supreme Court in dealing with the case said: "The first inquiry is: When was the lien statement filed, on the fifth or twenty-first of December, 1889?" Then follows a discussion of the earlier cases to which we have referred; and then appears that portion of the opinion which we have quoted above, in which it is said that the date of filing the lien was December 21, the date upon which the amended lien statement was filed.

Later on in the opinion it is held that the suit was commenced against Wright by the filing of the original petition, and that the fact that he did not enter his appearance within the ninety days after the lien statement was filed was immaterial. Wright's name repeatedly occurred in the body of the petition, where he was designated as "defendant John A. Wright," and it was held that failure to insert his name in the caption of the petition was a mere clerical error; that

summons might have been issued on the petition as it stood, and that the date of filing the petition, and not that of the issuance of the summons, was the date of the institution of the suit.

It is readily seen, therefore, that the latter case is not squarely in point on the question that we have before us. It did not involve the right to file an amended petition to enforce a lien based upon an amended lien statement, the latter being filed subsequent to the institution of the suit. Furthermore it is readily apparent that it was immaterial in that case to determine whether the date of filing the lien statement sought to be enforced was to be regarded as December 5 or December 21, for the reason that the petition was filed December 28, and this was held to be the date of the commencement of the suit against Wright. Obviously the suit was begun within the prescribed ninety days, whether this period be reckoned from December 5th or December 21st.

In the case before us, the ground upon which the trial court sustained the demurrers is so narrow and technical that we are not inclined to support its ruling, unless compelled to do so by a ruling of our Supreme Court on the very question involved. The lower court reached its conclusion with reluctance but felt compelled to do so under the authorities to which the court refers. Under the Constitution the last previous ruling of the Supreme Court on any question of law or equity is controlling upon us, and it is our plain duty to follow it. [Cons. art. VI., sec. 6.] We are cited to no decision of the Supreme Court later than that of South Missouri Lumber Company v. Wright, *supra*, bearing upon the real question before us, and we have found none. And we do not consider the ruling in that case by any means decisive of the point here in controversy.

The lien statement (sometimes called the lien claim, or lien account) is frequently referred to as "the

lien." The instrument filed is of course not the lien, but the latter is the charge upon the property arising by operation of law upon the filing of a proper instrument of writing, i. e. the lien statement, within the required time. Upon the filing of such instrument in due form, the lien at once arises, and where the claimant files his suit to enforce the lien, we think it is inaccurate to say that, by thereafter filing a second lien statement, merely to make such a correction as was made here, he thereby abandons the original *lien*. On the contrary, he is seeking to perfect and enforce that lien—attempting to enforce one lien and only one for the same demand. This ought not to be held to violate the principle that he can have but one lien for the same demand, for obviously he seeks to enforce but one. It is immaterial for our purposes here that, in such a case as this, he may be regarded as having abandoned the first lien statement. If so, it does not mean that the lien arising therefrom is abandoned. This could no more be said to be true than it could be said that a plaintiff, by filing an amended petition abandons his suit, although he is regarded as having abandoned the prior pleading. The most that the South Missouri Lumber Company case can be said to decide, so far as concerns the question before us, is that where a claimant files an amended lien statement, prior to bringing a suit to enforce the lien, even where the first lien statement was not void, a liberal construction of the mechanic's lien law would allow him ninety days after filing the second lien statement in which to bring his suit to enforce the lien. Not having sought to enforce the lien arising from filing his first lien statement, he could well be considered as having abandoned the lien so created.

That the policy of our courts has long been to give a liberal construction to the mechanic's lien statute is well known. In DeWitt v. Smith, 63 Mo. 266, the court speaking through WAGNER, J., said: "The

courts at one time were inclined to hold that enactments for mechanic's liens were in derogation of the common law, and their provisions should therefore be construed strictly against those who sought to avail themselves of their benefits. But the better doctrine now is, that these statutes are highly remedial in their nature, and should receive a liberal construction to advance the just and beneficial objects had in view in their passage. Their great aim and purpose is to do substantial justice between the parties, and this should never be lost sight of in giving them a practical construction." This rule of construction has been steadily adhered to by our courts.

In Sawyer, etc., *Lumber Company v. Clark*, 172 Mo. l. c. 598, 73 S. W. 137, the court speaking through GANTT, P. J., said: "It has often been held that this statute should receive a liberal construction to effectuate its remedial purposes." [See, also, Powers, etc., *Roofing Company v. Trust Company*, 146 Mo. App. 36, 123 S. W. 490; *Crane Company v. Real Estate Company*, 121 Mo. App. l. c. 225, 98 S. W. 795, and cases there cited.]

In *Barnett v. Cluney*, 68 Mo. App. 146, this court speaking through RAMBAUER, P. J., said: "The first lien filed in this case was unquestionably defective, as it erroneously stated the name of the contractor. . . . Hence the first lien account filed was not a full compliance with the statute, and to that extent defective. Whether it would have supported an action or not, it is needless for us to decide as under the later cases a mere defect in the first lien account justifies the filing of another. It is proper practice in such cases to have the second lien account refer in some manner to the first, so that the record should not show two incumbrances where in fact only one exists." In other words, the court there recognized clearly that the claimant sought to enforce but one lien. This is true in the case before us; and here the plaintiff's second

amended petition recites the filing of both lien statements, thereby showing that it seeks to enforce but one lien for its demand.

We shall not attempt to discuss the cases to which we are referred by diligent counsel for appellant, bearing upon the doctrine that an amended petition relates back to the institution of the suit. This of course is the general rule. [Smith v. Transit Company, 133 Mo. App. l. c. 205, 113 S. W. 216, and authorities there cited.] Our Code however makes liberal provision for the amendment of pleadings, and it has been repeatedly held that these provisions should be given a liberal construction. Sec. 8220, *supra*, provides that "the pleadings, practice, process and other proceedings" in cases arising under the mechanic's lien statute "shall be the same as in ordinary civil actions and proceedings in circuit courts," except as the statute may otherwise provide. Great liberality has been allowed in amending petitions to enforce mechanic's liens. [Hannon v. Gibson, 14 Mo. App. l. c. 36; Newman v. Railway, 19 Mo. App. 100; Mann v. Schroer, 50 Mo. 306; Wheeler v. Milling Company, 73 Mo. App. 672; Darlington v. Eldridge, 88 Mo. App. 525; Meyer v. Schmidt, 131 Mo. App. 53, 109 S. W. 833.]

Had the petition been amended to make the description of the property therein conform to that in the first lien statement, no question could have arisen as to the propriety of the amendment. The difficulty in the case arose merely because of the doctrine that the amended petition relates back to the date of the institution of the suit. The doctrine of "relation" is of course a mere fiction of law, and it has been said that it should be resorted to only for the promotion of justice and for promoting the lawful intention of parties, by giving effect to acts or instruments which, without it, would be invalid. [24 Am. & Eng. Ency. (2 Ed.) 275; Ormiston v. Trumbo, 77 Mo. App. l. c. 316; Land & Lumber Company v. Franks, 156 Mo. l.

c. 690, 57 S. W. 540.] However, as we have said above, the general doctrine seems to be established that the amended petition relates back to the filing of the original petition. Nevertheless we think that it does not prevent the plaintiff here from enforcing the one lien with which it has sought to charge the property. No new cause of action is set out in the amended petition, but on the contrary it declares upon the same cause of action as the original petition and seeks to enforce the same lien. And if the allegations of the amended petition had constituted a departure from the original petition, this could not have been reached by demurrer.

In *Galbreath v. Newton*, 45 Mo. App. 312, the action was upon special taxbills. Long after the institution of the suit upon the original taxbills, and after the latter had, on appeal been adjudged irregular or defective, amended bills were issued to take the place of those originally sued upon. Thereupon plaintiff filed an amended petition declaring upon the taxbills as amended. The defendant moved to strike out the amended petition on the ground that it was a departure from the cause of action contained in the original petition, in that the amended petition declared upon taxbills issued since the action was begun. The appellate court sustained the action of the lower court in overruling the motion, holding that it was proper to amend the original bills, as the latter were not void, saying: "The amended taxbills as now set out in the amended petition do not constitute new and distinct causes of action, different from those in the original petition, but comprise the same causes of action more definitely and formally declared."

While that was not a mechanic's lien case, the principle involved was substantially that with which we are dealing. The suit was solely to enforce the lien of the special taxbills. Such a suit can no more be brought prior to the issuance of the taxbills upon which it is founded than can an action be brought to

enforce a mechanic's lien prior to the filing of the instrument requisite to give rise to the lien.

For the reasons indicated above we are of the opinion that the plaintiff could rightfully amend its lien statement, in the manner set out above, and thereafter amend its petition to conform thereto; and though the amended petition may be said to relate back to the institution of the suit, plaintiff may nevertheless enforce its lien created by the filing of the original lien statement and which was simply made more definite and perfected by filing the second lien statement. To say that the plaintiff should be driven out of court, under such circumstances, without a hearing of its claim upon the merits, and when it is too late for plaintiff to institute another action to enforce its lien would be merely to stick in the technicalities of the law. It would indeed be a sad commentary upon our system of jurisprudence; especially in view of the oft-repeated declaration of our courts to the effect that the mechanic's lien statute should be given a liberal construction to effectuate the purposes of its enactment, and in view of the supposed liberality of our Code with respect to the amendment of pleadings.

Counsel for respondents have cited to us but two cases, and these holding that the statutory notice of ten days must be given prior to the filing of a lien statement, where one, other than the original contractor, wishes to avail himself of the benefit of the mechanic's lien statute. In view of the provisions of section 8231, *supra*, no comment is necessary upon this question. Respondents say, however, that there is no allegation in the second amended petition of the giving of this notice "as to the lien of August 10, 1910, which is sought to be enforced." This question might be disposed of by saying that from the portion of the second amended petition quoted above it appears that it is distinctly averred that the statutory notice was given. There is nothing upon the face of the sec-

ond amended petition to indicate that the notice incorrectly described the property; and the question would not be reached by the demurrer. It may however be well to say that as there was but one lien, but one notice was necessary, and the notice given, describing the property as described in the first lien statement, was sufficient to point out and identify the premises in question. This is all that is required. [Hammond v. Darlington, 109 Mo. App. 333, 84 S. W. 446; Powers, etc., Cornice & Roofing Company v. Muir, 146 Mo. App. 36, 123 S. W. 490.]

The judgment of the circuit court is reversed, and the cause remanded, with directions to that court to overrule the demurrers of respondents, and that the cause as to them proceed to trial upon the merits. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

GEORGE T. RECAR, Appellant, v. EDNA M. RECAR, Respondent.

St. Louis Court of Appeals, March 1, 1913.

APPELLATE PRACTICE: Review of Matters of Exception: Prerequisites. Where the abstract of the record does not show that an exception was preserved to the overruling of the motion for a new trial, the appellate court will not review the evidence or the finding and judgment thereon.

Appeal from Jefferson Circuit Court.—*Hon. H. B. Irwin*, Special Judge.

AFFIRMED.

Charles M. Reeves for appellant.

NORTONI, J.—This is a suit in equity in which it is sought to set aside a judgment and decree of di-

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orce procured several years before. It is alleged the decree of divorce sought to be set aside was procured through fraud practiced upon the court in and about its procurement. Upon hearing the evidence, the court found the issue for defendant and entered judgment dismissing plaintiff's bill. From this judgment plaintiff prosecutes the appeal here and seeks a review of the evidence.

While all of the evidence and the motion for a new trial are preserved in the bill of exceptions, no exception whatever, touching the action of the court in overruling the motion for a new trial, appears in the abstract. In this condition of the record, we are precluded from reviewing the evidence and the finding and judgment thereon, for the motion for a new trial avails nothing unless an exception be preserved to the action of the court in overruling it. [See Wilbrandt v. Laclede Gas Light Co., 135 Mo. App. 220, 115 S. W. 497.] The judgment should therefore be affirmed. It is so ordered. *Reynolds, P. J., and Allen, J.*, concur.

J. H. HARRISON, Respondent, v. H. P. COLEMAN
et al., Appellants.

St. Louis Court of Appeals, March 1, 1913.

1. **LANDLORD AND TENANT: Breach of Covenant: Measure of Damages.** Where an eviction of a lessee is occasioned through the fault of the lessor, the measure of damages to the lessee for the breach of a covenant for quiet enjoyment is the value of the unexpired term, less the rent reserved.
2. **DAMAGES: Breach of Contract: General Damages: Pleading.** In a suit for damages for breach of a contract, plaintiff may recover, under a general allegation and without special pleading, such damages as naturally arise from the breach.
3. **LANDLORD AND TENANT: Breach of Covenant: General Damages: Pleading.** In an action by a lessee for breach of a

covenant for quiet enjoyment, damages to the amount of the value of the unexpired term, less the rent reserved, may be recovered under a general allegation of damages, inasmuch as this is the natural result of the breach and hence is an element of general damages.

4. **DAMAGES: Special Damages: Waiver: Trial Practice.** By not objecting to the introduction of evidence of special damages not pleaded, the defendant waives his right to complain of the action of the court in submitting it for consideration; the court being authorized by Sec. 1847, R. S. 1909, in case of an immaterial variance, to order an immediate amendment, or to direct the facts to be found according to the evidence.

Appeal from Dunklin Circuit Court.—*Hon. W. S. C. Walker*, Judge.

AFFIRMED.

Brewer & Riley for appellants.

The only damage alleged by the respondent in his petition is for the rents and profits and costs recovered by John A. Hope against him in the ejectment suit and expense respondent was put to in moving and being out of the possession of the premises too late to obtain other lands to cultivate for the year 1910, yet there was not a scintilla of evidence going to show at what expense he was put in moving and any damages resulting by reason of not obtaining any other land to make a crop for the year 1910. When there is a failure of proof of a material averment in the petition, there can be no recovery. *Rutledge v. Railroad*, 110 Mo. 312. Plaintiff cannot recover on a cause of action not stated in the petition. *Cole v. Amour*, 154 Mo. 333; *Michael v. Kennedy*, 148 S. W. 983.

Shepard, Reeves & McKay for respondent.

It is a well-settled principal of law, that a petition is good after verdict in many instances where it would be held bad on demurrer or motion; for, after verdict the rule is, that if a matter material to plaintiff's cause of action be not expressly averred in the peti-

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tion but the same be necessarily implied from what is expressly stated therein, the defect is cured by verdict. *Hurst v. Ash Grove*, 96 Mo. 168; *Moellman v. Gieze-Henselmeier Lbr. Co.*, 134 Mo. App. 485; *Munchow v. Munchow*, 96 Mo. App. 553; *Thomason v. Mut. Ins. Co.*, 217 Mo. 497; *Whitewater Merc. Co. v. Devore*, 130 Mo. App. 339; *Mason v. Deitering*, 132 Mo. App. 26; *Goode v. Coal & Coke Co.*, 151 S. W. 508.

NORTONI, J.—This is a suit for damages accrued to plaintiff through the breach of the covenant for quiet enjoyment in a lease. Plaintiff recovered and defendant prosecutes the appeal.

It appears that, by a written indenture of lease, plaintiff leased from defendant thirty-five acres of timber land for the term of four years from and after the first day of January, 1909. By the terms of the lease and as a consideration for the demise to him, plaintiff agreed to cut and remove the timber from the lands described in the lease and to break the ground for which he was to receive all of the crops that he might raise thereon. It appears that plaintiff cleared between twenty-five and thirty acres of the land during the first year of the term—that is, 1909—and in May, 1910 had a crop out on a considerable portion of the ground cleared. However, John A. Hope, the true owner of the land, instituted a suit in ejectment against plaintiff and evicted him by process of law from the possession of the premises during the month of May, 1910. In this suit in ejectment, Mr. Hope recovered, besides the possession of the premises, a judgment of two hundred dollars against plaintiff as for rents and profits. Having been thus evicted under a judgment in ejectment establishing a title in Hope paramount to that of defendant, under whom plaintiff held by the lease, he instituted this suit against defendant for damages accrued through defendant's

breach of the covenant for quiet enjoyment. Plaintiff recovered in the amount of \$644, and there is no controversy here about so much of this recovery as was allowed to compensate him for the rents and profits adjudged against him in the ejectment suit—that is, the amount of two hundred dollars.

But, it is said, that portion of the recovery which was allowed on the theory of compensation for the use of the premises during the years 1910, 1911 and 1912 is unauthorized for the reason damages therefor are not claimed in the petition. There can be no doubt that, on a breach of the covenant for quiet enjoyment in a lease, where an eviction is occasioned through the fault of the lessor, the measure of damages which may be allowed to the lessee is the value of the unexpired term, less the rent reserved. [1 McAdam, *Landlord and Tenant* (4 Ed.), pp. 436, 831; *Mack v. Patchin*, 42 N. Y. 167.] By the lease defendant demised to plaintiff thirty-five acres of land, and of this plaintiff had cleared and prepared for the plough between twenty-five and thirty acres. The larger portion of that cleared had actually been broken and was in crop at the time of the eviction. As and for rent reserved for the full term of four years, plaintiff was to clear and break the land. It therefore appears that the rent reserved was nearly all paid for the full term at the time of the eviction, and no one can doubt that plaintiff was entitled to recover the reasonable rental value of the lands for the remainder of the term, less the value of the additional work about clearing and breaking the same to be performed on his part. The petition lays no claim in plain words for the value of the unexpired term—that is to say, for the reasonable rental value of the lands during the years for 1910, 1911, 1912—and, because of this, it is argued damages on that score should not have been allowed thereunder. The petition sets forth all of the facts pertaining to the matter, as is required by the Code, avers the breach, and

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prays a recovery therefor in the sum of \$1500. Obviously this is sufficient, for the reason that damages for loss of the use of the premises during the years 1910, 1911, 1912 were general in character, and it is not necessary to specially plead them. In suits for damages on a breach of contract, as is this one, one may recover under the general allegations, and without special pleading, such damages as naturally arise and generally flow from such a breach, for it cannot be said of such damages that they were not in contemplation of the lessor at the time the lease was made. [Hesse v. Imperial Light & Power Co., 160 Mo. App. 431, 140 S. W. 911; see Cohn v. Norton, 57 Conn. 480.] It was not necessary for plaintiff to minutely specify the amount he desired to recover for damages accruing on account of the breach for the loss of the use of the premises during the years 1910, 1911, 1912. [See Sedgwick on Damages (9 Ed.), sec. 1266.]

But, aside from this, the point now made against the sufficiency of the petition is unavailing, even if such damages were special in character, for the reason the evidence touching the matter was all admitted without objection or exception from defendant. Plaintiff introduced evidence tending to prove that the reasonable rental value of the premises for the unexpired term, less the work that he should do, was far in excess of the value of that allowed by the jury. There was no objection or exception interposed by defendant to this evidence, and in such circumstances, even if it tended to prove special damages not specified in the petition, it was competent for the court to treat with it as presenting no more than an immaterial variance. By the provisions of the statute (Sec. 1847, R. S. 1909), it is declared that when the variance between the allegation and proof is not material, the court may direct the facts to be found according to the evidence, or may order an immediate amendment without

costs. As such evidence was competent for consideration by the jury on the question of damages, though relating to an item not specially pleaded, defendant, by omitting to object to its being received, waived his right to complain of the action of the court in submitting it for consideration in the instructions. [Mellor v. Mo. Pac. R. Co., 105 Mo. 455, 470, 471, 16 S. W. 849; Chamlee v. Planters Hotel Co., 155 Mo. App. 144, 134 S. W. 123; Litton v. C. B. & Q. R. Co., 111 Mo. App. 140, 85 S. W. 978.]

However, the damages awarded plaintiff for the reasonable value of the rental of the premises for the remainder of the term after eviction, less the value of his work to be performed as for rent reserved, all of which was in evidence before the jury, were general in character and recoverable without being separately stated, as is the case in pleading special damages. [Sedgwick on Damages (9 Ed.), sec. 1266.] The judgment should be affirmed. It is so ordered. *Reynolds, P. J., and Allen, J., concur.*

VAN H. STOKES et al., Respondents, v. ANDREW H. MILLS et al., Appellants.

St. Louis Court of Appeals, March 1, 1913.

1. **STATUTE OF FRAUDS: Answering for Another's Debt: Extension of Credit to Third Party.** F and son, who operated a sawmill, the product of which defendants purchased, being desirous of procuring feed on credit from plaintiffs, the latter wrote to defendants that they would not let F and son have feed on their own account, but would do so "provided we may send you an O. K.'d bill the first of each month and receive our remittance from you by the 10th," in answer to which defendants wrote to plaintiffs that F and son had requested them to deduct from the purchase price of the lumber "such amounts as may be owing for current feed bills and pay the same to you direct." "I must, however, have approved bills from you by the 5th of each month and I can remit to you on or before the 10th." Held, that it was proper to construe the letters as

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extending credit, in the first instance, to defendants, and not to F and son, so that the Statute of Frauds (Sec. 2783, R. S. 1909), requiring a promise to answer for the debt of another to be in writing, did not apply.

2. ____: ____: _____. In determining whether a contract was one to answer for another's debt, within the Statute of Frauds (Sec. 2783, R. S. 1909), the test is to ascertain to whom the credit was given, and if the plaintiff dealt with the defendant alone, without giving credit to the person to whom the goods were furnished, the case is not within the statute.

Appeal from Dunklin Circuit Court.—*Hon. W. S. C. Walker, Judge.*

AFFIRMED.

Bradley & McKay for appellants.

(1) There was no evidence upon which to render a judgment for the plaintiff under the pleadings and the evidence in this cause, and the judgment was for the wrong party. *Bohle v. King-Brinsmade Merc. Co.*, 114 Mo. App. 439; *Morris v. Kansas City*, 117 Mo. App. 298; *Schmitte v. Transit Co.*, 108 Mo. App. 186. (2) The court erred in giving the instruction No. 1 on the part of plaintiff, for the reason that under the pleadings and the evidence in this case there was no evidence upon which to base the same, and plaintiff's theory is not sustained by the pleadings and the evidence. *Summers v. Life Ins. Co.*, 90 Mo. App. 691; *Merritt v. Paulter*, 96 Mo. 237; *Naylor v. Cox*, 114 Mo. 232; *Druey v. White*, 10 Mo. 354. (3) The court erred in refusing defendants' instruction No. 2 because it correctly sets out defendants' Mills Brothers defense and conforms to the pleadings and issues in this cause. *Aultman & Taylor Co. v. Smith*, 52 Mo. App. 351; *Whipple v. Building & Loan Assn.*, 55 Mo. App. 554.

T. R. R. Ely for respondents.

Plaintiffs' petition states that they sold the bill sued on at the request of Mills Bros., and while it does

not specifically state that the same was charged to Mills Bros., that fact is necessarily implied, and if the cause of action was imperfectly stated in the petition, the defendant waived that by his answer. *Weaver v. Harlan*, 48 Mo. App. 319. There is another rule of pleading to the effect that facts which are necessarily implied from the direct averments in a pleading, will be deemed as having been averred. *Dillan v. Hunt*, 82 Mo. 150; *Eans v. Bank*, 79 Mo. 182.

NORTONI, J.—This is a suit on an account for the purchase price of feed. Plaintiffs recovered and defendants prosecute the appeal.

It appears that Charles H. Fletcher & Son, for whom the feed was purchased, owned and operated a sawmill in Stoddard county, and sold and shipped the lumber and shingle product therefrom to defendant Mills Brothers, at Decatur, Illinois. In order to operate the sawmill, it was necessary that Fletcher & Son should procure considerable feed for their horses, and plaintiffs refused to sell the same to them because they were insolvent. Fletcher & Son informed plaintiffs that defendant Mills Brothers would pay for all feed required, as they were receiving the product of the sawmill. Thereupon plaintiffs wrote to defendant Mills Brothers on April 19th to the effect that they would not let Fletcher & Son have feed on their own account but would do so "provided we may send you an O. K.'d bill the first of each month and receive our remittance from you by the 10th." In answer to this letter defendants wrote plaintiffs on April 26th that Fletcher & Son had requested them to deduct from the purchase price of the lumber "such amounts as may be owing for current feed bills and pay the same to you direct." The writer then says, "I must, however, have approved bills from you by the fifth of each month and I can remit to you on or before the 10th or within a day or two after that." After having re-

ceived this letter, in response to that of plaintiffs to the effect that they would not furnish Fletcher & Son feed on their own account and only on condition they might receive remittance from defendant by the tenth of each month, plaintiffs furnished Fletcher & Son the feed as required and transmitted the O. K.'d bills therefor to defendants monthly. Defendants paid several of these bills at the proper time, but on September 16th wrote plaintiffs they would not pay for feed delivered to Fletcher & Son thereafter. Plaintiffs furnished Fletcher & Son no feed after receiving the letter last above mentioned, and this suit is for a balance due for that sold during the months of July and August.

It is urged the judgment should be reversed for the reason the note, or memorandum in writing, consisting of the two letters, is insufficient to evince a special promise from defendants to answer for the debt, default or miscarriage of Fletcher & Son, as is required by the Statute of Frauds (Sec. 2783, R. S. 1909). It may be the argument would be sound if the right of recovery were asserted on the theory that defendants undertook through a collateral agreement to respond for the debt of Fletcher & Son, but such is not the case. Here it appears plaintiffs refused to extend any credit whatever to Fletcher & Son and wrote defendants fully to that effect but would furnish the feed provided defendants would remit for the bill rendered by the tenth of each month. When defendants' letter is considered in response to this proposition, it was competent for the court to construe them together as a contract for the extension of credit in the first instance to defendants and not to Fletcher & Son at all. Furthermore, there is oral evidence in the record which is uncontradicted, and it was received without objection or exception, to the effect that no credit was extended to Fletcher & Son, but, on the contrary, it was extended to the

defendants alone for all of the feed which Fletcher & Son obtained until September 16, when defendants notified plaintiffs it would not further be responsible. Other correspondence in the record between the parties during the interim reveals beyond question that plaintiffs expected to hold defendants for the feed bill and that defendants expected to pay them, but finally declined to pay the balance here in suit, all of which was contracted, however, prior to September 16th, when defendants notified plaintiffs it would not pay for feed purchased thereafter.

In cases of this character, the test question universally applied is: To whom was the credit given? If, in the first instance, the credit was given to Fletcher & Son, then, of course, the Statute of Frauds requires a note or memorandum in writing evincing a special promise to answer for the debt before an action may be successfully maintained against the third party. But, as said by Mr. Browne, in his valuable work on Statute of Frauds (5 Ed.), sec. 157, "In cases where the plaintiff has dealt with the defendant alone, there is no duty or liability but that of the defendant, and his promise to pay for the work or the goods is manifestly original and valid." Here plaintiffs declined to deal with Fletcher & Son and dealt alone with the defendants in extending the credit.

From the instructions given, it appears the court, before whom the issue was tried, found the fact to be that the credit was originally extended to defendants by plaintiffs and not to Fletcher & Son at all. In such circumstances, the Statute of Frauds is wholly beside the case and does not obtain for the reason there is no collateral promise to answer for the debt, default or miscarriage of another. [See Rottman v. Pohlmann, 28 Mo. App. 399; Glenn v. Lehnens, 54 Mo. 45; Steele v. Ancient Order, 125 Mo. App. 680, 103 S. W. 108.]

In the light of all of the facts and circumstances surrounding the parties at the time, it was competent

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for the court to find as it did, that the transaction contemplated an extension of credit to defendants and in no sense to Fletcher & Son. Such was the obvious intention of the parties. The judgment should therefore be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

W. W. DINGS, Appellant, v. PULLMAN COMPANY,
Respondent.

St. Louis Court of Appeals, March 1, 1913.

1. **CARRIERS OF PASSENGERS: Sleeping Car Companies: Duty Regarding Passenger's Effects.** A sleeping car company does not accept the effects of its passengers as a bailee, nor does it undertake to maintain a place where accommodation is furnished for the safety of its patrons' property, like an inn-keeper, and hence it does not assume the exceptional liability of an insurer, which the law imposes upon common carriers of goods or innkeepers because of their public calling—its duty being merely to exercise reasonable care to maintain a vigilant watch by competent persons for the safety of passenger's effects left in its car.
2. ——: ——: ——. Mere loss of luggage taken by a passenger into a sleeping car does not make out a *prima facie* case of liability against the sleeping car company.
3. **NEGLIGENCE: Undisputed Facts: Question for Jury.** The question of whether or not a person was negligent may not be declared as a conclusion of law, even on undisputed facts, where reasonable men would differ with respect to the conclusion to be drawn therefrom.
4. **CARRIERS OF PASSENGERS: Sleeping Car Companies: Duty Regarding Passenger's Effects: Question for Jury.** While a train was standing in front of a depot in a town, plaintiff's effects were lost from a sleeping car, on which he was a passenger. The train stood there about twenty or thirty minutes, and during all of that time the rear door of the car was locked. the windows were closed and a watchman was stationed at the forward door. *Held*, that reasonable men might differ as to whether the sleeping car company was negligent with respect

to the manner in which it kept watch for the safety of plaintiff's effects, and hence the question was one for the trier of the facts.

5. APPELLATE PRACTICE: Conclusiveness of Finding. Where the evidence on an issue of negligence is such that different minds might disagree, the finding of the trial court will not be disturbed, on appeal.

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey, Judge.*

AFFIRMED.

McPheeters & Wood for appellant.

(1) Where the facts, upon which a decision in the trial court is based, are uncontradicted, their legal effect is a question of law, and the appellate court may inquire into these facts to determine whether or not they warrant the decision rendered by the trial court.

2 Ency. of Pleading & Practice, 405; Breen v. Fair Association, 40 Mo. App. 425; Waddell v. Williams, 50 Mo. 216; Henry v. Bell, 75 Mo. 194; Douglas v. Arr., 58 Mo. 573; Moore v. Hutchinson, 69 Mo. 429.

(2) A sleeping car company is required to use reasonable care in guarding the property of its passengers against loss and reasonable care must be measured with reference to the danger of loss reasonably to be apprehended under existing conditions, and such a degree of care the passenger is entitled to rely upon. The failure on the part of the company to use such ordinary care, or reasonable care, is negligence which will render the company liable for loss of a passenger's property. 6 Cyc. 654; 25 Am. & Eng. Ency. of Law, 1118; Williams v. Webb, 27 Misc. (N. Y.) 508; Falls River v. Pullman, 6 Ohio Dec. 85; Carpenter v. N. Y. Cent., etc., 124 N. Y. 53.

(3) Where it is the custom of a sleeping car company to expressly invite its passengers to leave their berths and its coach to go to the dining room of the station for their meals, or to the smoker, toilet room or other conveniences about the

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car, and where it is the custom of the traveling public under such circumstances to leave their baggage in their berths in the Pullman coaches, while absent upon such invitation, express or implied, and where it is the custom and duty of the company to provide a watch over the car, upon which watch the passenger, as a matter of custom, has a right to rely, the company is liable for the loss of baggage of a passenger, through no fault of the passenger, upon its being shown that while the passenger was absent from his berth on invitation of the company no watch was maintained on the inside of the car; the porter having gone into the station for dinner; that the conductor was left alone to perform the duties of both the conductor and the porter, and that, as admitted, many keys to the rear door of the car were negligently permitted by the company to be in the possession of discharged employees. Lewis v. Sleeping Car Co., 143 Mass. 267; Woodruff v. Diehle, 84 Ind. 474; Pullman v. Mathews, 74 Tex. 654; Palmeter v. Wagoner, 11 Alb. L. J. 149; Hamilton v. Pullman Co., 42 Mo. App. 134; Pullman Co. v. Gardner, 3 Penn. 78; Carpenter v. New York, 124 N. Y. 53; Root v. New York, 28 Mo. App. 189; Pullman v. Pollock, 69 Tex. 120.

Lehmann & Lehmann for respondent.

(1) Even though the evidence is undisputed, if fair-minded persons of ordinary intelligence might differ as to the inferences to be drawn therefrom, negligence is a question of fact for the jury. Gratiot v. Railroad, 116 Mo. 466; Combs v. City of Kirksville, 134 Mo. App. 645; Schwyhart v. Barrett, 145 Mo. App. 332; Shamp v. Lambert, 142 Mo. App. 567; Johnson v. Ice Co., 143 Mo. App. 441; Munro v. Railroad, 155 Mo. App. 710; King v. Railroad, 143 Mo. App. 279. (2) The finding on a question of fact by a trial court trying a law action without a jury is as conclusive on appeal as is the verdict of a jury,

.and will not be reviewed in this court. Nickey v. Leader, 235 Mo. 30; Bank v. Lowder, 141 Mo. App. 603; Stephens v. Fire Assn., 139 Mo. App. 369; Milne v. Railroad, 155 Mo. App. 465; Noble v. Nelson, 154 Mo. App. 616; Berst v. Moxom, 157 Mo. App. 342; Stoepler v. Silverberg, 220 Mo. 258.

NORTONI, J.—This is a suit for damages alleged to have accrued as a result of defendant's negligence. The finding and judgment were for defendant, and plaintiff prosecutes the appeal.

Plaintiff was a passenger on defendant's sleeping car en route to California and lost his overcoat, said to be of the value of seventy-five dollars, in transit. By this suit he seeks to recover the value of the coat, and avers that its loss occurred through the omission of defendant to exercise due care toward protecting the coat from theft. But one witness gave testimony in the case and that was the plaintiff himself.

It appears that the train, of which the sleeping car was a part, stopped for the evening meal at about six o'clock p. m. at Newton, Kansas, where the passengers alighted and went into the dining room of the depot for supper. Plaintiff left his overcoat hanging in his berth in the sleeping car, but it does not appear that he directed the attention of either the Pullman conductor or porter thereto. While eating his supper in the depot dining room, he noticed defendant's porter eating at another table therein. Upon his return to the car, he found the overcoat had been taken.

From plaintiff's evidence it appears that the Pullman conductor stood watch at the forward end of the car upon the depot platform while the passengers were eating supper, and it is to be inferred that the rear door of the sleeper was locked. There is nothing in the case to suggest that any of the car windows were left open or that an entrance therein could be had except through the forward door where the conductor

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stood watch. As the date of the loss was December 25, it may be inferred from this that the windows of the car were closed, as is usual in the winter time in the Kansas climate. Upon discovering the loss of his coat, plaintiff called the attention of the porter thereto, who, in turn, called the conductor, but neither of them was able to locate it, and plaintiff said the conductor stated the only way the coat could have been taken from the car was by some one unlocking and entering the rear door, as he had stood guard in front. In this connection, it is said, the conductor remarked that it might be some discharged Pullman employee probably had keys with which the rear door could have been unlocked and an entry made therein.

The case was tried before the court without a jury and no instructions were asked or given on either side. After hearing the evidence, the court found the issues for defendant and entered judgment accordingly.

A sleeping car company does not accept the effects of its passengers as a bailee, nor does it undertake to maintain a place where accommodation is furnished for the safety of its patrons' property, like an innkeeper, and, therefore, it does not assume the exceptional liability of an insurer which the law imposes upon common carriers of goods or innkeepers by reason of engaging in such public callings. On the contrary, the liability of the sleeping car company with respect to the effects of its patrons is analogous to that of a railway carrying passengers in regard to the safety of the personal belongings and baggage which the passenger is allowed to take with him into the sleeping car. Therefore, the duty which the law devolves upon the sleeping car company to protect the passenger's effects is that of due care under the circumstances of the particular case. This being true, mere proof of loss of luggage, which is taken by a passenger into the sleeping car, does not make out either an absolute or *prima facie* case of liability against the

company. However, it is the duty of the company to exercise reasonable care toward a vigilant watch by competent persons for the safety of the passenger's belongings while in the car, and if it omits to exercise such care thereabout, it may be required to respond for the breach of its obligation on the grounds of negligence. [See 6 Cyc. 659; Efron v. Wagner Palace Car Co., 59 Mo. App. 641; Root v. New York Cent. Sleeping Car Co., 28 Mo. App. 199.]

It is argued by the plaintiff that the facts above set forth afford an irresistible conclusion of negligence, and that as they were uncontradicted, the court erred in giving judgment for the defendant. The question of negligence is always a relative one and is to be determined by reference to the facts and circumstances surrounding the particular matter in judgment. Here it sufficiently appears the porter was absent from the car, being in the depot at supper, but the conductor stood watch at the forward door of the car and the rear door was locked and the windows closed. There is nothing in the case to suggest that all fair-minded men without a difference of opinion would conclude that an ordinarily prudent person in the exercise of reasonable vigilance should have done more to the end of protecting property within the car. The matter of negligence with respect to the performance of a duty may not be declared as a conclusion of law, even on undisputed facts, where reasonable men may draw different inferences touching the same therefrom. [Gratoit v. Mo. Pac. R. Co., 116 Mo. 450, 466, 21 S. W. 1094.]

Though it devolved upon defendant to use reasonable precaution to keep a strict watch for the safety of the property of passengers in the car, it is clear that fair-minded men may infer from the facts in evidence here that it performed the full measure of this obligation in the circumstances of the case. Obviously, it is a reasonable view that even high care and circumspection would not require more than the keep-

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ing of the rear door locked, the windows closed and a watchman at the forward entrance, while the train stopped in front of a depot in the ordinary town for a period of twenty or thirty minutes consumed in taking a meal at six o'clock in the evening. However, some persons might take another view on the same facts, and this alone affords a valid reason for sustaining the judgment here. If different minds might disagree on the matter, the question of negligence was one of fact to be determined by the trial court and may not be reviewed on appeal. The judgment should be affirmed. It is so ordered. *Reynolds, P. J., and Allen, J., concur.*

CORDELIA ARSTE, Respondent, v. WILLIAM ARSTE, Appellant.

St. Louis Court of Appeals, March 1, 1913.

1. **APPELLATE PRACTICE: Maintenance: Review.** In a suit by a wife for maintenance, the evidence will be reviewed, on appeal, according to the rule obtaining in equitable actions, and the judgment will be affirmed or reversed as the exigencies of the case may require; but where the evidence is highly conflicting, the appellate court will usually defer to the finding of the trial judge.
2. **MAINTENANCE: Sufficiency of Evidence Appellate Practice.** In a suit by a wife for maintenance, defended on the theory that plaintiff had been guilty of conduct justifying defendant in abandoning her, *held*, under conflicting evidence, that a judgment for plaintiff would not be disturbed on appeal.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher, Judge.*

AFFIRMED.

Zachritz & Zachritz for appellant.

Schnurmacher & Rassieur for respondent.

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NORTONI, J.—This is a suit on the part of plaintiff wife against her husband for maintenance. The court found the issue for plaintiff and gave judgment awarding her thirty-five dollars a month for maintenance and one hundred dollars suit money. From this judgment defendant prosecutes the appeal.

The parties were married in 1893 and continued to live together until February, 1909, when defendant husband abandoned plaintiff. It appears that defendant owns some ten or twelve thousand dollars worth of property and follows the calling of a publisher in St. Louis. For a period of several years before defendant abandoned his wife, she and he together maintained a rooming house in the city of St. Louis and kept some six or eight roomers all the time. One Hawkins, a police officer, roomed at their place for several years, and it seems defendant became obsessed of the idea that his wife and Hawkins were unduly friendly. The case concedes that defendant abandoned his wife, but he seeks to justify the act by showing that he had good cause to do so, and introduced considerable testimony tending to prove unseemly conduct between her and Hawkins. To contradict this, plaintiff introduced several witnesses who had roomed and lived in their house and all of whom gave testimony tending to prove that, while she treated Hawkins nicely, she treated all other roomers and boarders the same. Two of these witnesses were defendant's cousins and another a relative by marriage, and none of them appeared to be unfriendly to him. Plaintiff and Hawkins also pointedly contradict every charge made by defendant against her.

While a suit for maintenance proceeds under the statute, the courts treat with the evidence in such cases in accordance with the rule which obtains in equitable actions—that is to say, the appellate court reads and reviews the evidence, as in suits in equity, and either affirms or reverses the judgment thereon as the ex-

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gencies of the case may require. However, where the evidence is highly conflicting, the appellate court usually defers to the finding of the trial judge because of the superior advantage he enjoys in having an opportunity to see the witnesses before him, face to face, and thus more accurately determine the matter of their credibility and the weight of the evidence *pro* and *con* on the issue. [See *Wyrick v. Wyrick*, 162 Mo. App. 723, 145 S. W. 144.] Though the record contains ample evidence tending to show plaintiff wife was unworthy in the instant case and that the husband abandoned her with good cause, it is replete, too, with evidence given by apparently good people, who were obviously familiar with all of the facts, tending to show she is a good woman and that defendant abandoned her without cause whatever. It is unnecessary, and could serve no good purpose, to set forth this evidence in detail. Suffice to say we have read it all and find many damaging statements therein on either side. But the different stories were detailed in full in the presence and hearing of a most careful, conservative and just judge who presided at the trial, and, according to his view, the attack made upon the plaintiff is an unjust one and the defendant is at fault in abandoning her without good cause. We are not declined to disturb this finding and judgment, in view of the great conflict appearing in the testimony, and especially is this true when we remember that the trial court had the witnesses before it and was thus afforded an opportunity to look them in the eye and to judge by their demeanor and conduct on the stand as to who did and who did not speak the truth. We may add that much of the testimony introduced on the part of defendant is so unreasonable in its character that it is not calculated to inspire confidence in a court of justice.

The judgment should be affirmed. It is so ordered.
Reynolds, P. J., and Allen, J., concur.

ZELLA DUDLEY, by Next Friend, Respondent, v.
WABASH RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, March 1, 1913.

1. **NEGLIGENCE: Imputed Negligence: Parent and Child.** The negligence of a father of a little girl, riding with him, in driving upon a railroad track in front of a train cannot be imputed to her.
2. **RAILROADS: Failure to Give Crossing Signals: Proximate Cause.** The requirement of Sec. 3140, R. S. 1909, with respect to the giving of signals by a railroad train eighty rods from a crossing, is for the purpose of warning persons approaching the crossing of the presence of the train, and, therefore, if a person knows of the presence of a train, the warning so required would be without office and the failure to give it would not be the proximate cause of an injury resulting from such person being struck by the train.
3. ____: ____: _____. The negligence of the father of a little girl, riding with him, in driving in front of a railroad train, when he saw it in time to avoid it, cannot be said to be the sole cause of her injury, so as to free the railroad company from liability to her, as a joint tort-feasor, for not giving the crossing signals required by Sec. 3140, R. S. 1909, where it can be inferred that she might have saved herself from injury if the signals had been given.
4. **NEGLIGENCE: Liability of Joint Tort-feasor: Parent and Child.** A defendant is liable for injuries to a little girl, even though its negligence concurred with the negligence of her father in producing her injuries.
5. ____: **Liability of Joint Tort-feasor: Joint or Several Action.** Joint tort-feasors may be required to respond, either jointly or severally as plaintiff may elect, for an injury resulting from their concurring negligence.
6. **EVIDENCE: Res Gestae.** While a declaration, in order to be a part of the *res gestae*, need not in every case, be coincident, in point of time, with the main fact to be proved, and while it is enough that the two be so clearly connected that, in the ordinary course of affairs, the declaration can be said to be a spontaneous exclamation of the real cause of the injury, yet such declaration must reveal a spontaneity of expression, in order to constitute it a verbal act, and if it is made even on the very scene of the accident, but a very few minutes there

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after, and purports to be a narrative of a past event, it is not to be regarded as a part of the *res gestae*.

7. ____: _____. In an action for injuries to a little girl, received in a collision between a wagon in which she was riding and a railroad train, plaintiff's father, who was driving the team, in response to a question propounded by a brakeman as to how the accident happened, several minutes after the collision and while he was still on the right of way, said that "the horse got frightened and he did not think the train was so close as it happened to be and he thought he could get across ahead of it." *Held*, that this statement was a narrative of a past occurrence and hence was not admissible as a part of the *res gestae*.
8. **DAMAGES: Personal Injuries: Excessive Verdict.** A verdict of \$5000 for the breaking of an ankle and a leg of a fifteen-year-old girl, who also received a number of painful flesh wounds and a general nervous shock which may tend to impair her health during her whole life, is not excessive.

Appeal from Audrain Circuit Court.—*Hon. James D. Barnett, Judge.*

AFFIRMED.

J. L. Minnis and Robertson & Robertson for appellant.

(1) Although Dudley's negligence cannot be imputed to plaintiff (*Becke v. Railway*, 102 Mo. 544; *Stotler v. Railroad*, 200 Mo. 107), yet as Dudley saw the train the negligence of failure to sound the statutory crossing signals was immaterial negligence and the sole producing cause of the injury was Dudley's wilfulness in attempting to cross. *Mockowik v. Railroad*, 196 Mo. 570; *Murray v. Transit Co.*, 176 Mo. 183; *Heintz v. Transit Co.*, 115 Mo. App. 671; *Fry v. Transit Co.*, 111 Mo. App. 335; *McManamee v. Railroad*, 135 Mo. 440; *Hutchinson v. Railroad*, 195 Mo. 546; *Hutchinson v. Railroad*, 161 Mo. 246; *Moody v. Railroad*, 68 Mo. 470. (2) The verdict is excessive. *Neves v. Green*, 111 Mo. App. 642; *Connon v. Nevada*, 188 Mo. 162; *McCaffery v. Railroad*, 192 Mo. 152; *Brady v.*

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Railroad, 206 Mo. 540; Garard v. Coal & Coke Co., 207 Mo. 255; Burke v. Railroad, 120 Mo. App. 683; Evers v. Wiggins Ferry Co., 127 Mo. App. 244; Kirby v. Railroad, 146 Mo. App. 304.

E. S. Gantt and Barclay, Fauntleroy & Cullen for respondent.

(1) When the statutory signals are not given and a collision occurs at a crossing, it is presumed that this negligence caused it, and the burden is on the defendant to prove otherwise. Byars v. Railroad, 141 S. W. 926; McNulty v. Railroad, 203 Mo. 475. (2) The doctrine of imputable negligence does not obtain in this State, hence the negligence, if any, of the driver cannot be imputed to the occupant. Byars v. Railroad, 141 S. W. 926; Stotler v. Railroad, 200 Mo. 107; Sluder v. Transit Co., 189 Mo. 107; Profit v. Railroad, 91 Mo. App. 369; Marsh v. Railroad, 104 Mo. App. 577; Baxter v. Transit Co., 103 App. 597; Becke v. Railroad, 102 Mo. 544; Munger v. Sedalia, 66 Mo. App. 629; O'Rourke v. Railroad, 147 Mo. 352; Bailey v. Railroad, 152 Mo. 462; Johnson v. City of St. Joe, 96 Mo. App. 671; Keitel v. Cable Co., 28 Mo. App. 657; Duvall v. Railroad, 65 L. R. A. 722.

NORTONI, J.—This is a suit for damages accrued to plaintiff through the negligence of defendant. Plaintiff recovered and defendant prosecutes the appeal. Plaintiff is a minor and prosecutes her suit by her father as her next friend duly appointed.

At the time of her injury, plaintiff was about fifteen years of age. She, in company with a younger sister and her father, was en route home from the town of Martinsburg in an open buggy when they were run upon by defendant's train at a public road crossing on its tracks. As a result of the collision, plaintiff's younger sister, Eunice Dudley, was killed, and she

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(plaintiff) received painful and permanent injuries, to compensate which this suit is prosecuted. The negligence relied upon for a recovery pertains to the failure of defendant to ring the bell or sound the whistle attached to its locomotive engine on approaching the road crossing, in accordance with the statute in that behalf made and provided. The record is replete with evidence tending to sustain the charge of negligence thus laid. It appears plaintiff, in company with her little sister and father, had attended the Old Settlers' Picnic on that day and were traveling on the public road en route home about nine o'clock at night when she received her injuries. At the point of the crossing of the railroad and the public road involved here, the railroad tracks were depressed about five feet in a cut, and the public road approaching the crossing was, of course, depressed as well. Along the side of the railroad and adjacent to the public road, high weeds grew profusely and obstructed the view of those on the public road approaching the railroad crossing. The view of plaintiff's father thus being obstructed, he drove upon the railroad track immediately in front of the train, which, it is said, had omitted to sound the usual warnings of approach by means of bell or whistle. The material facts touching the right of recovery and the matter of defendant's negligence and that pertaining to the contributory negligence of plaintiff's father, who was driving the team, have all been reviewed by this court on a prior occasion, and it will be unnecessary to set them out in detail here. For the purpose of this appeal, it is sufficient to say, that there is nothing in the evidence tending to prove plaintiff guilty of negligence as a matter of law, for she was at most the guest of her father who drove upon the railroad track in front of the passing train. It appears that plaintiff looked and listened but did not observe the train before going upon the track, and defendant's

negligence in failing to give the crossing signals is abundantly proven in the case.

The case of *Dudley v. Wabash R. Co.*, 167 Mo. App. 647, 150 S. W. 737, was a suit by plaintiff's father in his own right, under the wrongful death statute, for the death of plaintiff's little sister, Eunice Dudley, which resulted from the same collision. Reference to that case is made for a more extensive statement of the facts pertaining to this one, and, indeed, many of the questions presented on this appeal are concluded by the judgment of the court there. It will be unnecessary to consume time in further review of those matters, and on this appeal consideration will be given to those questions only which were not adjudicated in that case. In the former case we held, after a thorough review of all the evidence, that both the matter of defendant's negligence and that of the contributory negligence of plaintiff's father, which was more important on the right of recovery there than here, were questions for the jury. If plaintiff's father, when suing in his own right for the death of his daughter, Eunice, was not to be denied a recovery as a matter of law on the ground of contributory negligence in driving in front of the approaching train, it is obvious the right of recovery of this plaintiff should not be denied on that score, for his negligence may not be imputed to her in the circumstances of the case, as she was a little girl in his care, or his guest in the carriage as it were, and there is nothing whatever to suggest active negligence on her part. [*Stotler v. Chicago & A. R. Co.*, 200 Mo. 107, 144, 145, 146, 147, 98 S. W. 509.]

Though by no means conclusive, there is some evidence tending to show plaintiff's father saw the light of the train and knew of its approach before driving upon the crossing and that he said he thought he could "make it across" in safety. No one can doubt that the requirements of the statute with respect to the sounding of signals by bell and whistle are for the purpose

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of warning those approaching the crossing, and, therefore, if one on the public road actually sees the train and knows of its presence, the warning so required is without an office to perform. In such circumstances, no recovery is to be allowed for the mere omission to sound the crossing signals when the injured person saw the train and knew of its approach in ample time to avoid the collision, for the very good reason that the omission to sound the alarm is in no sense the inducing or proximate cause of the injury. In this view, defendant requested the court to instruct the jury that if plaintiff's father actually saw the train or the head-light of the engine and knew of its approach and, notwithstanding, attempted to cross the track in front of the same and thus occasioned the collision, then plaintiff is not entitled to recover. This proposition is incorporated in different form in two separate instructions requested by defendant and refused by the court. It is argued the court erred in refusing to so charge the jury, for it is said if plaintiff's father saw and knew of the approach of the train in ample time to have avoided the collision, the failure to sound the crossing signal was remote in the chain of causation, and the negligence of the father alone is the proximate cause of plaintiff's injury, for he had charge of the team and drove upon the track immediately in front of the approaching locomotive. The argument concedes that the negligence of plaintiff's father is not to be imputed to her as a matter of law, but asserts that, as plaintiff derives her cause of action through the omission of defendant to give warning of the approach of the train, then she is not entitled to recover if the jury should find that her father saw the train and knew of its presence in time to avert the injury. It is urged that if plaintiff's father saw the train and, notwithstanding, drove upon the crossing, then his negligence is the sole cause of plaintiff's injury and no liability

obtains against defendant for his negligent act. We must reject this argument as unsound in the circumstances of the case, for it omits to reckon with the separate liabilities which attend the acts of individual joint tort-feasors, and omits to reckon, too, with the obligation imposed on defendant by the statute to warn plaintiff of the approach of the train as well as to warn her father, who was driving the team. Such an argument would inhere with much force and be persuasive, indeed, if not conclusive, in the suit of the father, but not so where the injured daughter is asserting her right of recovery, for the defendant may be required to respond for her injury though both her father, who drove the team, and defendant were negligent in the premises, and even though the negligence of both concurred in entailing the injury upon her, provided she was duly careful herself, and it is found that she was. No one can doubt that joint tort-feasors may be required to respond either jointly or separately, as the plaintiff may elect, for an injury which results from the concurring negligence of two or more wrongdoers. [Miller v. United Rys. Co., 155 Mo. App. 528, 134 S. W. 1045.] This being true, if the plaintiff was in the exercise of ordinary care on her own part, as the jury found she was, she is entitled to recover from the defendant for injuries received as a result of its omission to sound the bell or blow the whistle, even though her father knew of the approach of the train and negligently approached it, unless the jury should find that she, too, knew of the approach of the train in time to have avoided the collision and the instructions requested do not incorporate the latter proposition. They hypothesize alone the question of the father's knowledge of the approaching train, and it is conceded in the argument his negligence is not to be imputed to her. To elucidate, touching this matter it may be said that had defendant sounded the crossing signals in compliance with the statute, likely plaintiff would have

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received warning in time to have saved herself from injury though the father drove forward upon the crossing as he did—that is to say, she might have jumped out of the buggy or, indeed, have prevented her father from driving upon the crossing; so it cannot be said as a matter of law that the father's negligence is the sole cause of the injury even if he did see the train approaching, for the statute imposed the obligation on defendant to warn plaintiff of the approach of the train as well as to warn her father. In this view, it is reasonably probable that defendant's negligence in omitting to warn plaintiff (for as to this we put aside the father's knowledge of the situation, which may not be imputed to her) concurred with the negligence of plaintiff's father as the proximate cause of her injury. Such being true, the matter was for the jury, as reasonable probabilities on the evidence always are, and the court very properly refused the instructions as requested, for they hypothesized alone the father's knowledge of the approaching train, and it is obvious this may not be imputed to plaintiff. Though the father was negligent his fault may not have been the sole cause of plaintiff's injury.

As a result of the collision, plaintiff's little sister, Eunice, about twelve years old, was killed, the plaintiff herself was precipitated a considerable distance on the railroad right of way and severely and permanently injured and her father was thrown into the weeds by the roadside. It is said that the train was running from forty to forty-five miles an hour. A brakeman, Hopson, was riding on the engine. The train slowed down and stopped as soon as possible. Hopson alighted from the engine and ran back to where plaintiff's father was by the side of the railroad. Hopson, the brakeman, testified that at the time he found plaintiff's father over on the right of way, "it seemed to be like he was just raising up." Defendant's counsel then sought to prove by the witness Hopson that he

asked Dudley, plaintiff's father, how it happened, and Dudley said that "the horses got frightened and he did not think the train was so close as it turned out to be and he thought he could get across ahead of it." The court declined this offer of proof, and it is argued here this was error, for it is said the statement so made by plaintiff's father at the time within a few minutes after the fact of the collision and in the full view of the calamitous results was of the *res gestae*. While the declaration to be a part of the *res gestae* need not be coincident in point of time with the main fact to be proved, in every case, and while it is enough that the two shall be so clearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous exclamation of the real cause of the injury, it is certain that the exclamation must reveal a spontaneity of expression, in order to characterize it as a verbal act. The spontaneity of expression immediately upon or after the happening of the event and in the very midst of the surroundings is the element which imparts the characteristics of a verbal act performed at the time and thus renders the expression of the *res gestae*. [See Leahey v. Cass Avenue, etc., Ry. Co., 97 Mo. 165, 10 S. W. 58; Senn v. Southern Ry. Co., 108 Mo. 142, 18 S. W. 1007.] However, if the statements sought to be introduced are made even on the very scene of the accident, but a few minutes thereafter, and purport to be a narrative of a past event, they are not to be regarded as of the *res gestae*, but rather as mere hearsay. For a case very much in point here, see Adams v. Hannibal & St. Joseph R. Co., 74 Mo. 553; see, also, Koenig v. Union Depot Ry. Co., 173 Mo. 698, 73 S. W. 637; Redmon v. Met. St. R. Co., 185 Mo. 1, 11, 84 S. W. 26. It is clear the statement sought to be introduced here as of the *res gestae* was but a mere narrative made several minutes after the collision, for the train slowed down from forty to forty-five miles an hour and stopped in the meantime and

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the brakeman had run back to where he found plaintiff's father who "seemed to be like he was just raising up" and propounded the inquiry as to how it happened. There seems to be no such spontaneity about the declaration as could impart the characteristics of a verbal act performed at the time so as to render it a part of the main fact of the collision, but rather it was a narrative of the occurrence which the brakeman sought to elicit.

The jury awarded plaintiff a recovery in the amount of \$5000 and it is urged this is excessive, but we are not so persuaded. It appears plaintiff's ankle was broken and one of the bones of her leg was broken, too; besides this she received a number of painful flesh wounds and a general nervous shock which may tend to impair her health during her whole life. The injuries are both permanent and painful and as to what damage may be entailed upon a young girl of her age, when her future together with the prospects of matrimony, etc., are considered, no one can tell. We are not inclined to disturb the verdict.

Other questions are raised but they have all been sufficiently considered in the companion case of Dudley v. Wabash, *supra*, heretofore decided, and it is unnecessary to consider them again here. The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

WAYNE A. DUNCAN, Appellant, v. SARA B. TURNER, Respondent.

St. Louis Court of Appeals, March 1, 1913.

1. **REAL ESTATE BROKERS: Right to Commission.** A real estate broker, in order to recover a commission for negotiating an exchange of real estate, which his principal refused to consummate, must show full performance of his obligations under the agency contract.

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2. _____: _____. **Defenses: Fraud.** Fraudulent misrepresentations made by a real estate broker to induce his principal to enter into a contract to exchange real estate, which was afterwards repudiated by the latter, constitute a defense to an action by the broker for a commission.
3. _____: **Right to Commission.** A real estate broker is entitled to a commission for procuring a purchaser for land, when he produces one who is ready, willing, and able to buy on his principal's terms, although the latter refuses to consummate the sale.
4. _____: _____. The negotiation, by a real estate broker, of a contract of sale or exchange of real property with a responsible person and on his principal's terms, which contract can be enforced by the latter, is equivalent to the production of a purchaser, and entitles the broker to a commission.
5. _____: _____. A contract to pay a real estate broker five per cent commission for procuring a purchaser for real estate entitles him to a commission of that amount for procuring a customer with whom the principal contracts for an exchange of properties, especially where the principal, in employing the broker, stated that she would exchange her land for other property.
6. **CONTRACTS: Construction.** The intention of the parties to a contract is to be gathered from a consideration of all its provisions.
7. **REAL ESTATE BROKERS: Right to Commission.** The fact that a sale effected by a real estate broker does not conform to his original authority does not prevent the recovery of a commission by him, if the sale was ratified by his principal or conformed to modified authority.
8. _____: _____. **Fraud of Agent: Negligence of Principal.** Where the owner of farm land was induced by a real estate broker, with whom she had listed her land for sale or exchange, to enter into an exchange contract for four city houses, by false statements as to the condition of three (which, at his suggestion, she refrained from examining) as to the time when a deed of trust on them fell due, and that the alley behind them was a private one and not subject to be improved by the city at the expense of abutting owners, the broker could not recover a commission on his client's refusal to carry out the contract, inasmuch as, because of the confidential relation existing between them, she was entitled to rely on his representations; and this is true although the truth was discoverable on proper inquiry by her.

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9. **FRAUD AND DECEIT: Confidential Relation: Estoppel.** One who occupies a confidential or *quasi* confidential relationship toward another and asserts to such other as a fact that which he might have known was not a fact, is estopped to say that he did not intend to deceive the other, or that the other should not have relied upon his statements, or that he had no knowledge on the subject whatever.
10. **REAL ESTATE BROKERS: Action for Commission: Fraud: Questions for Jury.** In an action by a real estate broker for a commission for negotiating a contract for the exchange of real estate between defendant and another, which contract defendant refused to carry out, defended on the ground that defendant was induced to enter into the contract by means of fraudulent misrepresentations on the part of plaintiff, *held*, under the evidence, that the case was one for the jury.
11. ____: ____: Counterclaim: Instructions. In an action by a real estate broker for a commission for negotiating a contract for the exchange of real estate between defendant and another, defendant filed a counterclaim alleging that she was induced to execute the contract through plaintiff's fraudulent misrepresentations; that, upon learning of the fraud, she repudiated the contract, but that plaintiff nevertheless recorded it, and that, in order to remove the cloud upon her title created by it, she incurred expense, for which she prayed judgment. The evidence showed that there were defects in plaintiff's customer's title and that these had not been cured at the time stipulated for the exchange, but that the customer was moving toward that end at the time, and the contract provided that he should have a reasonable time to cure defects. The court charged that, although no fraud was committed, yet if the jury found that the requirements of the contract were not complied with by plaintiff's customer until after the time for so doing had elapsed, and that thereafter defendant notified plaintiff that she would not proceed under the contract, but he nevertheless thereafter recorded it, and, in order to remove the cloud upon her title created by it, she incurred expense, she was entitled to recover under her counterclaim. *Held*, that the instruction was erroneous in permitting a recovery under the counterclaim even though no fraud was committed by plaintiff, since, under the evidence, that was the only ground upon which a recovery could be had; that it was also erroneous in so far as it assumed that the failure of plaintiff's customer to clear his title by the fixed time entitled defendant to cancel the contract, when the contract gave the parties a reasonable time after such date in which to perfect title; and that it was erroneous in so far as it assumed that it was an actionable wrong for plaintiff to record the contract after re-

ceiving notice that defendant had repudiated it, even though it was a valid contract.

12. **RECORDING INSTRUMENTS: Fraudulent Recording: Right of Recovery.** The recording of a contract affecting real estate will not give rise to a cause of action unless it was recorded by one who, without authority, purported to represent the owner, or unless the contract was procured from the owner through fraud.

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen, Judge.*

REVERSED AND REMANDED.

John Cashman for appellant.

(1) The defendant's answer admits that defendant executed the contract sued on and it was fatal error to give the instruction in the nature of a demurrer to the evidence. (a) The rule has been long established, in Missouri, that if a real estate agent procures a purchaser, ready, willing and financially able to make the purchase absolutely, on the terms fixed by the principal, or to respond in damages, and the principal accepts such purchaser, and enters into a contract with him respecting the sale of the property, the agent is *prima facie* entitled to his commissions. *Sallee v. McMurry*, 113 Mo. App. 253; *Lemon v. Lloyd*, 46 Mo. App. 452; *Love v. Stone*, 31 Mo. App. 501; *Chipley v. Leathe*, 60 Mo. App. 15; *Childs v. Crithefield*, 66 Mo. App. 422; *Gellatt v. Ridge*, 117 Mo. 553; *Nichols v. Whitacre*, 112 Mo. App. 692; *Morgan v. Keller*, 194 Mo. 663; *Kilpatrick v. Wiley*, 197 Mo. 123; *Goldsberry v. Eades*, 161 Mo. App. 8. (b) Even though the contract in this case should be construed to grant an authority to sell only, yet if an exchange and not a sale be made, still the plaintiff is entitled to his commissions, to the same extent as he would be if a sale had been made. *Gether v. McCormick*, 79 Mo. App. 332; *Nichols v. Whitacre*, 112 Mo. App. 692; *Gellatt v. Ridge*, 117 Mo. 553.

W. L. Coley for respondent.

NORTONI, J.—This is a suit by a real estate broker for his commissions. Besides denying the right of recovery, defendant, by her answer, interposed a counterclaim. At the conclusion of the evidence, the court peremptorily directed a verdict for defendant on plaintiff's cause of action and submitted the issue arising on defendant's counterclaim to the jury. The finding and judgment were accordingly against the plaintiff on his cause of action and in favor of the defendant on her counterclaim in the amount of \$422.35. From this judgment plaintiff prosecutes the appeal.

We will first review the matter pertaining to plaintiff's cause of action and then as to defendant's counterclaim. It appears plaintiff is a real estate broker in St. Louis and defendant owned a farm of 328 acres in Boone county which she desired to dispose of. On March 5, 1909 defendant authorized plaintiff, in writing, to sell her farm at an agreed valuation of forty-five dollars per acre and agreed to pay him therefor a commission of five per cent on the purchase price for conducting the sale. The written contract by which defendant employed plaintiff to dispose of the farm seems to contemplate that a cash sale should be made at forty-five dollars per acre, but this writing consists in part of numerous questions propounded to defendant and answers given by her which indicate as well that she would exchange the farm for other property. Two of those questions and answers are as follows: "Will you exchange for St. Louis income property? A. I might . . . Will you exchange the farm for any other property? A. Yes." However, we do not regard this as very material, for it appears that defendant actually entered into a written contract with a customer by the name of Funderburk, procured by plaintiff, for the exchange of her farm for four dwelling houses in St. Louis and a sum of money. This be-

ing true, plaintiff's right of recovery as for commissions must, of course, depend upon the validity and sufficiency of the contract between Funderburk and defendant for the exchange of properties to the end of effectuating a sale, for it devolves upon him to show full performance on his part in accordance with his original undertaking and such modifications as the defendant may have authorized in the meantime. And the strict letter of his original agency contract is no longer material.

The evidence tends to prove that plaintiff interested Homer Funderburk in defendant's farm and interested defendant as well in four houses, numbered 5052, 5054, 5058, and 5060 Garfield avenue, St. Louis, which Funderburk owned at the time. Funderburk sent his brother-in-law, Wahl, to investigate defendant's farm, and defendant, in company with plaintiff, looked over one of Funderburk's houses and accepted assurances from plaintiff touching the others until she became satisfied concerning their exchange value. After some preliminary negotiations between the parties, plaintiff drew up a contract in writing, of date May 5, 1909, which was executed by both defendant and Funderburk and stipulated for an exchange of the property owned by them on or before the 12th day of June thereafter. According to this contract, defendant agreed to convey her Boone county farm to Funderburk with good and sufficient title and clear of all incumbrances and Funderburk agreed to convey to her the four houses, numbered 5052, 5054, 5058, and 5060, Garfield avenue, St. Louis, each house subject, however, to a deed of trust of \$3,500 at six per cent, etc. Furthermore Funderburk agreed to pay defendant at the time the exchange of properties was consummated, in cash, the sum of \$4760. This written contract provides, too, that the titles to the properties should be good, but if upon examination either title should prove defective, a reasonable time is to be allowed to perfect

the same and the contract to remain in force and effect in the interim. It appears that some slight defects were discovered in defendant's title when an abstract to the farm was furnished and requirements were preferred touching the matter of curing the same. When the title to Funderburk's houses was examined and a certificate thereof furnished plaintiff, it appeared there was a second deed of trust for \$2000 thereon and a judgment lien for something near \$500 against the property and besides some unpaid taxes. Furthermore, the certificate of title revealed that the title stood in one Mrs. Mathias and not in Funderburk at all, but this matter is unimportant, for Funderburk testified positively that he owned the property and it is to be inferred that his deed was not yet recorded. Besides, either side, as is usual, was entitled to a reasonable time to cure defects in title.

It is shown and not contradicted that Funderburk was a man of considerable means and ready, able and willing to consummate the trade. The evidence reveals that he deposited a certified check for \$7500 with plaintiff to remove the second mortgage, judgment, tax lien and other incumbrances on the houses not mentioned and provided for in the contract and to pay the \$4760 cash agreed upon with defendant, but, notwithstanding this, defendant refused to carry out her part of the contract, for the reason that plaintiff had practiced deceit upon her. If plaintiff practiced deceit upon defendant and induced her, through misrepresentations, to enter into the contract with Funderburk, no one can doubt that such matters may be shown in defense of this suit by the agent for his commissions, claimed on the theory that he has performed his contract of agency through consummating a contract between Funderburk—one ready, able and willing to buy—and defendant, for a sale or exchange of her farm. But, though such be true, the question of plaintiff's right of recovery as for commissions was one for the

jury, and the court erred in peremptorily directing a verdict against him thereon.

In those cases where the suit is by the real estate broker against his principal for commissions, and it appears the actual sale of the property has been defeated because of the owner's refusal to complete the trade, the law regards and treats as full performance of the agent's contract the production and introduction as such to the seller of a proposed purchaser ready, able and willing to buy the property in accordance with the terms imposed by the owner. In the sense of the law, the broker has performed his contract and effected a sale when he has produced and introduced to the seller a purchaser ready, willing and able to buy, who is prevented from so doing alone by the refusal of the seller to carry out the contract. [See *Goodson v. Embleton*, 106 Mo. App. 77, 80 S. W. 22; *Sallee v. McMurry*, 113 Mo. App. 253, 88 S. W. 157.] Here it does not appear that the plaintiff produced and introduced Funderburk to the defendant in person, but, by construction of law, the equivalent is accomplished by the written contract which he negotiated between the parties. Where the broker, through his efforts, procures a purchaser for the property of his principal and negotiates a valid, binding contract for his principal, with a responsible person, for the sale or exchange of properties between them, which contract may be enforced by the owner of the property against the purchaser so produced by the broker, the procurement of such enforceable contract alone is regarded as a full performance on the part of the broker, so as to entitle him to his commission where the owner—that is, his principal—refuses, without just cause, to complete the transaction. [Hayden v. Grillo, 35 Mo. App. 647; *Goldsberry v. Eades*, 161 Mo. App. 8, 142 S. W. 1080.] According to the uncontradicted evidence, plaintiff procured a purchaser for defendant's property and drafted a valid, enforceable written con-

tract between them which was executed by Funderburk on the one part and defendant on the other, stipulating for an exchange of property as above set forth. It appears Funderburk was responsible, and, according to the evidence, might have been required to respond in equity as for a specific performance of the contract, or in damages at law for its breach. Obviously the matter of plaintiff's right to recover commissions on this showing was a question for the jury.

But it seems the court placed a narrow construction upon the contract by which defendant employed plaintiff to negotiate a sale of her farm, and directed a verdict for defendant on the matter of his right to recover commissions on the theory that defendant should not be required to respond therefor except in the case of a sale of her farm for cash. This ruling reveals both an erroneous view of the broker's contract of agency and the case made by the evidence. It is true that the written contract, by which defendant authorized plaintiff to sell her farm and stipulated a commission of five per cent for so doing, seems to contemplate a sale at a valuation of forty-five dollars per acre, for it says: "I hereby authorize Duncan to sell the above described farm for the consideration of \$45 per acre, and I agree to pay the customary commission, five per cent (5%) for conducting said sale." But, be this as it may, other portions of the same writing reveal that defendant authorized plaintiff to negotiate for the exchange of her farm for other property as well, and especially is this true when such negotiations were actually conducted thereafter with defendant's consent and acquiescence. One of the questions propounded to defendant in this written authority and in connection with it and the answer to it is, "Will you exchange for St. Louis income property? A. I might." Another question and answer are "Will you exchange the farm for other property? A. Yes." Obviously this written authority, when considered all together,

reveals that plaintiff was authorized to negotiate a sale of defendant's farm for cash at \$45 per acre or an exchange for other property which might be acceptable to her. The contract for five per cent commissions is to be construed with reference to either, as the case may be. The polar star for the construction of instruments is that the intention of the party executing the document shall not be gathered from a remote or one apparent pertinent provision thereof alone, but, on the contrary, is to be gleaned from all that appears within the four corners of the instrument. [See *Gibson v. Bogy*, 28 Mo. 478; *Williamson v. Brown*, 195 Mo. 313, 337, 93 S. W. 791.] Though the concluding paragraph of the contract of agency stipulated a commission of five per cent for a sale at \$45 per acre, cash, the prior portions above copied revealed an intention on the part of defendant to consider propositions for the exchange of her farm for other property and, of course, if one agreeable to her was accomplished through the efforts of plaintiff the contract for commission remained intact, for no other commission was provided therein. It is certain that an agent is entitled to his commissions if he effects a sale of the property for his principal, even though the sale is not made in accordance with his original authority, if it appears that the contract was subsequently modified by the owner of the land and the transaction finally consummated by him in accordance with such modified contract. This is true, too, though the agent departs from the terms of his original authority in effecting the sale, provided his principal, the owner, subsequently adopts his negotiations and completes the transaction in accordance therewith, for, in such circumstances, a full ratification appears and the agent's original undertaking is to be regarded as modified by such subsequent ratification on the part of his principal. [See *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882; *Sallee v. McMurry*, 113 Mo. App. 253, 88 S. W.

157.] The evidence shows that defendant did not demur to the proposal for an exchange of properties with Funderburk but rather that she entered into negotiations thereabout on plaintiff's suggestion as if his authority related to either a sale for cash or exchange of her farm for other property satisfactory to her. She looked through one of the houses owned by Funderburk before entering into the contract and made inquiries of plaintiff regarding the others. She agreed to exchange her farm clear of incumbrances for the four houses, each subject to a deed of trust of \$3500 with six per cent interest thereon, and a payment to her of \$4760 in cash. These terms, along with other specifications not essential to mention at this time, were reduced to writing and incorporated in the contract between her and Funderburk. Afterwards she refused to make the exchange when it appeared that Funderburk was ready, able and willing to complete the full measure of his undertaking. Obviously if nothing more appeared in the case, plaintiff would be entitled to his commissions for having performed the full measure of his undertaking as a real estate broker in the premises, and it is clear that his right to compensation should have been referred to the jury.

However, defendant sets forth in her answer and insists in her evidence that plaintiff is not entitled to recover for the reason he induced her to enter into the contract with Funderburk through certain false and fraudulent representations made at the time and which she believed and on which she relied when she executed the same. Defendant insists that plaintiff represented to her that all of the four houses which she was to receive from Funderburk were equipped with fixtures, hardwood floors, and each with a steam heating plant in good condition and all were decorated throughout, etc.; and further that the deeds of trust thereon did not fall due until June, 1911, whereas in fact they fell due April, 1910. She accompanied plain-

tiff and went through one of the houses only. He informed her they were all alike and suggested she should not look through the others because it interfered with the tenants therein. She says he assured her he was looking after her interests and would do so in the premises and that his word was good concerning the matter, or something to that effect. It might be suggested that defendant was negligent in not going through the other four houses as they were all adjacent in one group and she was present in one of them at the time, but to apply the doctrine of negligence in the circumstances of the case would be severe, indeed, for, in a measure, the relation of principal and agent obtained between her and the plaintiff. The same is true of the deeds of trust of record. While the real estate agent is regarded in a sense as a broker and enjoys considerable latitude on that account, it is obvious that the confidential relation between principal and agent obtained here between plaintiff and this lady who seems to have relied on his word and judgment in a confiding manner. Certainly she should not be declared negligent as a matter of law in the circumstances of the case for failing to utilize the means of knowledge at hand and look through the other houses, investigate public records, etc., and if the jury should find that plaintiff made such representations to defendant, that they were false, that she relied upon them and entered into the contract with Funderburk because of them, then he should not be permitted to recover commissions though he procured a contract from a responsible party, for the law will not permit one to avail himself of benefits from his own wrongful act.

Another misrepresentation of fact set forth in the answer and relied upon at the trial by defendant concerns the alleyway in the rear of the four houses. Defendant said she informed plaintiff that she would not negotiate for the houses if the alleyway in the rear was a public one and likely to be constructed at the expense

of the property, as is the case with such alleys, and thereupon he assured her it was a private alley and no expense to her nor charge upon the property whatever could be entailed on that account. Afterwards she discovered this was false; that the alley was not a private one, but, rather, public; that it was unmade and threatened an immediate expense to be levied by the city on account of construction. Of course, if such representation was made by plaintiff, relied upon by defendant and she was influenced thereby in entering into the contract with Funderburk, at plaintiff's instance, then defendant is entitled to have this matter considered, along with the other alleged misrepresentations, as competent to defeat the right of recovery. This is true, too, whether plaintiff knew the several representations were false at the time he made them or not, for the plaintiff stood toward the defendant in the circumstances of the case as one having peculiar knowledge on the subject. Representations made by one under such circumstances are likely to carry great weight, especially with one who has a right to rely, as this defendant did, upon the word of plaintiff who occupied either a confidential or a *quasi* confidential relation concerning this real estate transaction. The law will not permit the plaintiff to assert for knowledge what he might have known that he ought not even to have believed and then say that he did not intend to deceive defendant thereabout, or that she should not have relied upon his statements, for the means of knowledge were at hand, or that he had no knowledge on the subject whatever and therefore did not intend to deceive, for the principle of estoppel precludes him. [Serrano v. Miller & Teasdale Commission Co., 117 Mo. App. 185, 93 S. W. 810; Raley v. Williams, 73 Mo. 310.] On the evidence in the record, the plaintiff's cause of action should have been submitted to the jury

and the evidence pertaining to misrepresentations above discussed is available in defense thereof.

Defendant's counterclaim sets forth all of the facts pertaining to the matter and avers that plaintiff induced her to sign and execute the contract for an exchange of properties with Funderburk by means of certain fraudulent representations therein set forth and which have been discussed heretofore; that upon discovering the truth with respect to these matters, she forthwith notified both Funderburk and plaintiff that she would not carry out her part of the contract. Notwithstanding this, plaintiff filed the contract between defendant and Funderburk of record in the office of the recorder of deeds for Boone county and had the same spread upon the record there, that the contract thus recorded in the county where her land lay constituted an apparent cloud upon her title which she was required to remove before negotiating a loan thereon which it was necessary to do. To remove this alleged apparent cloud upon her title, plaintiff was forced to and did institute a suit in equity in the circuit court of Boone county against Funderburk, which resulted in the cancellation of record of the contract before mentioned; that in and about the prosecution of this suit and the expenses entailed through plaintiff's wrongful acts in procuring the contract and recording the same, defendant was required to and did pay out the sum of \$500 and that she has been otherwise injured and damaged by reason of the said contract being placed on record by plaintiff, as aforesaid, in the further sum of \$500. In support of the counterclaim, the evidence tends to prove that plaintiff misrepresented the facts to defendant and induced her to sign the contract for an exchange with Funderburk thereby. Finally upon being fully advised concerning the whole matter, defendant notified plaintiff and also Funderburk that she would not carry out the contract on her part for those and other reasons. The contract re-

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quired the parties to complete the exchange of properties and pay over the money on or before the 12th day of June, and it seems that Funderburk's title to the property in St. Louis had not been fully cleared of the liens and incumbrances not mentioned in the contract at that time. However, he was moving to that end and according to the evidence he deposited a certified check for \$7500 with plaintiff to do so.

For defendant the court gave the following instruction:

"The court instructs you that if you believe and find from a preponderance of the evidence admitted in this case that the defendant Turner was not fraudulently induced to sign the instrument in writing admitted in evidence as plaintiff's Exhibit 'B,' yet if you further find from a preponderance of the evidence admitted as proof, that the conditions named in said written instrument were not complied with on the part of the plaintiff, or the person whom he claimed to represent, until after the time for its completion, or such further time as may have been extended by the defendant Turner for such compliance, if any, then the defendant Turner had the right to cancel said contract and refuse to further be bound by the same, and if you find and believe from a preponderance of the evidence the facts as above stated and that the defendant Turner, after the expiration of said contract by its terms, or after any time extended by the defendant, if any, notified the plaintiff Duncan that she would not further proceed under said contract, and if you further find that thereafter the plaintiff Duncan caused the said contract to be recorded in Boone county, Missouri, and that as a result thereof the defendant Turner suffered pecuniary loss, then your verdict should be for the defendant on her counterclaim in whatever sum, if any, the evidence shows her damages to have been."

This instruction is erroneous throughout. It authorizes a recovery by defendant on the counterclaim even though no fraudulent representations were put forward by plaintiff to induce her to sign the contract, which she alleges was afterwards recorded by him and thus constituted the gravamen of her complaint. The instruction authorizes a recovery on the counterclaim even though no fraud was employed in procuring the contract if the jury should find that the conditions named in the written contract were not complied with on the part of the plaintiff or Funderburk until after the time of its completion, that is, we understand, June 12th, or such further time as may have been extended by the defendant Turner for such compliance, and says that defendant had the right to cancel the contract if not complied with within that time. It thus assumes defendant had the right to cancel the contract for the mere failure of Funderburk to clear the liens off of his property and straighten up the title thereto on or before June 12th, the date the exchange was to be made, or at the expiration of such time thereafter as defendant had extended, and upon this assumption directed a finding for defendant if it should appear that, after she notified plaintiff she would not consummate the trade, the contract was nevertheless recorded in Boone county and that as a result defendant suffered pecuniary loss, etc. It may be said of this, that the contract between defendant and Funderburk provides in plain terms that either party may have a reasonable time after June 12th to perfect the title, clear off the liens, etc., and the contract should remain in full force and effect in the interim. The instruction pays no heed to this matter of reasonable time thus stipulated for but proceeds as though it devolved upon Funderburk to clear his title by June 12th, or within such time as defendant had extended to him. This is clearly an erroneous view, for, by assuming the contract to be valid, as the instruction does, either party

was entitled to the reasonable time provided for therein, and it is clear no default could be found until such had elapsed. Furthermore, this instruction proceeds as though it were an actionable wrong for plaintiff to record this contract in Boone county, even though it was valid in all respects, after defendant had notified plaintiff that she had repudiated and rescinded the same because Funderburk had not complied with its terms in fulfilling all of the conditions therein named. If the contract was a valid one, plaintiff had a right to record it, and there was no wrong in so doing and certainly defendant should not be permitted to recover for that unless the jury should find that Funderburk had not complied with its terms on his part, though a reasonable time had been granted him beyond June 12 for so doing and defendant had repudiated it. But even then, there is no right of recovery for the mere recording of a valid contract which is, under the law, admissible to record, for such contracts are muniments of title and may entail no actionable injury if rightfully made with full authority or without covin or deceit. It is only where the contract is made and recorded in the name of the owner by one without authority who purports to represent the owner or is procured from the owner through fraud and deceit and then recorded that the mere act of recording it against the land will operate a cause of action against the tortious agent, and such cause of action arises, of course, because of the tort involved in the wrongful act of executing the contract on the part of the agent without authority from the principal or inducing the principal to do so through fraudulent representation. [See Kilpatrick v. Wiley, 197 Mo. 123, 160, 161, 95 S. W. 213.] Whether the mere recording of this contract would constitute a cloud on title at all, it is not necessary to decide, for it sufficiently appears that in the instant case it actually did infringe defendant's rights, in that it impeded the placing of a loan on her land

until it was canceled and removed from the record by a court of equity. The evidence tends to prove the contract was procured from defendant by plaintiff through fraudulent representations, and if such is found by the jury to be true and plaintiff thereafter placed it of record and thus necessitated expenditures on the part of defendant in employing counsel, the prosecution of a suit in equity and expenses to Boone county in attendance upon the trial, then she is entitled to recover on the counterclaim therefor, otherwise not.

Error inheres in other instructions for defendant as well but as the case is to be retried it is unnecessary to discuss the instructions separately, for what has been said sufficiently indicates the proper theory to pursue. The judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, concurs. *Allen, J.*, having been of counsel, is not sitting.

SARAH VENEY et al., Respondents, v. HENRY H.
FURTH et al., Appellants.

St. Louis Court of Appeals. Argued and Submitted November 14,
1912. Opinion Filed March 1, 1913.

1. **APPELLATE PRACTICE: Equity Cases: Review.** While it is the duty of an appellate court to weigh the testimony in an equity case and determine the matter on its own conclusions derived therefrom, irrespective of the findings of the trial court, nevertheless, in arriving at a determination, it will pay great deference to such findings.
2. **FRAUD AND DECEIT: Constructive Fraud: Knowledge.** Fraud is chargeable to persons who, having the means of acquiring knowledge concerning the transaction, shut their eyes to all the surrounding circumstances, and, claiming to be ignorant of the fraud, seek an advantage to themselves through it.
3. **CANCELLATION OF INSTRUMENTS: Innocent Holder: Fraud and Deceit.** Promissory notes secured by a deed of

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trust were placed in the hands of a real estate agent, to be negotiated by him and the proceeds to be used in improving the mortgaged property. The agent pledged the notes and deed of trust to secure his own indebtedness, and the pledgee sold the collateral for nonpayment of the debt secured. In an action against the vendee at that sale, to cancel the notes and deed of trust on the ground they were obtained through fraud, held that neither the pledgee nor the vendee was an innocent holder or purchaser of the notes and deed of trust, and hence it is held that a decree cancelling them was proper.

4. **APPELLATE PRACTICE:** Review: Matters not Presented Below. An objection that the evidence does not respond to the issues or is not admissible under the petition cannot, under the statute, be raised for the first time on appeal.
5. **CANCELLATION OF INSTRUMENTS:** Tender: Pleading. In a suit in equity to cancel a note and deed of trust securing it, on the ground they were obtained through fraud, held that neither a tender before suit nor in the petition, of whatever may have been due from plaintiff, was necessary, since, first, plaintiff did not admit owing anything; second, even on defendant's theory that something was due, the amount was a matter of conjecture and dispute; and, third, the suit being in equity, an averment that plaintiff would comply with all orders and decrees of the court and would pay such amounts as the court might order, was sufficient.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher, Judge.*

AFFIRMED.

Henry H. Furth for appellants.

(1) Defendant Gould was a bona fide holder for value. (a) An extension of time, even for a single day, is a valuable consideration. *Loewen v. Forsee*, 137 Mo. 29; *Allen v. Harris*, 79 Mo. App. 490; *Deere v. Marsden*, 88 Mo. 512; *Smith v. Norman*, 19 Ohio St. 148; *Powers v. Woolfolk*, 111 S. W. 1187. (b) Security for a debt given after the debt was contracted but in pursuance of a prior or contemporaneous agreement constitutes the receiver a holder for value. *Miller v. Boykin*, 70 Ala. 469; *Boykin v. Bank*, 72 Ala. 263; *Marks v. Bank*, 79 Ala. 558; *Thompson v. Maddux*,

117 Ala. 468; *Jordan v. Thompson*, *Ibid.* On a sale on credit to be secured by notes as collateral, the receipt of the collateral after the delivery of the goods makes the seller a bona fide holder of the notes, although the notes in question were not specified or described at the time of the sale, and were not, in fact, then in possession of the buyer. *Fenby & Johnson v. Pritchard*, 2 Sandf. (N. Y.) 151. (c) One who takes a negotiable note as security for a pre-existing debt is a holder for value under the Negotiable Instruments Law, and so is a lienor to the extent of his lien. R. S. 1909, secs. 9996, 9998; *Payne v. Zell*, 98 Va. 294; *Wilkins v. Usher*, 97 S. W. 37; *Brooks v. Sullivan*, 129 N. C. 190; *Musick v. Alderman*, 77 Conn. 634; *Petrie v. Miller*, 67 N. Y. Supp. 1042, 173 N. Y. 596; *Brown v. James*, 114 N. W. 591; *Brewster v. Shrader*, 26 Misc. (N. Y.) 480, 57 N. Y. Supp. 606; *Lowell v. Bickford*, 88 N. E. (Mass.) 1; *Graham v. Smith*, 118 N. W. 726 (d) Value is any consideration sufficient to support a simple contract. R. S. 1909, sec. 9996; *Bank v. Tottenham* (1894), 2 Q. B. 717; *Bank v. Gordon*, App. Cas. 240; *Bank v. Silke* 2 Q. B. 435; *Banking Co. v. Bank*, 21 Q. B. 535. (e) The rule that the transferee of negotiable paper is not an innocent holder, if there are circumstances connected with the transfer sufficient to put an ordinarily prudent man on inquiry is uncertain and devoid of uniformity, and will not be followed in this State. *Hamilton v. Marks*, 63 Mo. 167; *Edwards v. Thomas*, 66 Mo. 468; *Bank v. Stanley*, 46 Mo. App. 440; *Bank v. Schoen*, 56 Mo. App. 160; *Leavitt v. Taylor*, 163 Mo. 158. (f) The title of a purchaser of negotiable paper before maturity cannot be defeated by proof of a want of due care on his part. Nothing less than fraud is necessary to defeat his title. *Bank v. Stoneware Co.*, 4 Mo. App. 276; *Bank v. Pipkin*, 66 Mo. App. 592; *Cloud v. Book & News Co.*, 23 Mo. App. 319; *Investment Co. v. Vette*, 142 Mo. 560; *Kuch v. Cornett*, 79 Mo. App. 574; *Investment Co. v. Filling-*

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ham, 85 Mo. 534; Wilson v. Ridler, 92 Mo. App. 335; Bank v. Hammond, 104 Mo. App. 403; Bank v. Salmon, 117 Mo. App. 506; Bank v. Bank, 109 Mo. App. 665; Bank v. Leeper, 121 Mo. App. 618; Jennings v. Todd, 118 Mo. 296; Mayes v. Robinson, 93 Mo. 114. (g) The doctrine of innocent holder applies to one taking a note as collateral security for a loan. Bank v. Eu-banks, 124 Mo. App. 499; Stewart v. Givens, 128 Mo. App. 389. (2) The signatures to the note being genuine, and the note knowingly signed, defendant Gould was not bound to make any inquiries before taking the note. There was no evidence of either fraud or bad faith on his part. Briggs v. Ewart, 51 Mo. 245. (3) Appellant Haas made all the inquiries that a reasonably prudent man was bound to make before purchasing at the sale. He pursued the title to his vendor Gould. (4) Respondents, by remaining passive for nine months after acquiring full and complete knowledge that defendant Dausman had pledged their papers to defendant Gould, ratified defendant Dausman's unauthorized act and are estopped by their laches.

Joseph A. Wright for respondents.

(1) Upon the testimony of the payee in the collateral note, he had full knowledge of everything at the time he accepted the \$515 note. Gould having had full knowledge of the facts, the appellant Max Haas could claim no greater right than his assignor could assert. Vette v. Sacher, 114 Mo. App. 363; Bank v. Ornsdorff, 126 Mo. App. 654. (2) Entirely apart, however, from any knowledge which Dausman may have imparted to him, Gould cannot be held to be an innocent purchaser for value. He purchased from George Dausman, the trustee in the deed of trust, under the circumstances aforesaid, and became chargeable with knowledge of the facts. Bank v. Furniture Co., 57 W. Va. 625, 70 L. R. A. 312.

STATEMENT.—On or about the 25th of April, 1905, plaintiffs below, one of them the respondent here, being the owners of a one-story house situated at 2614 Glasgow avenue in the city of St. Louis, executed a deed of trust to one George Dausman, as trustee, purporting to secure a principal note for \$1500 as well as semi-annual interest notes for \$45 each, the principal note due in three years after its date, the notes payable to one Henry J. Grimm. At the time of the transaction and for some time prior thereto, Dausman had been engaged in the real estate business at St. Louis, and plaintiffs, desirous of adding one or more stories to their building, and not having the money with which to do it, went to Dausman to raise the necessary money on the property. Dausman appears to have examined the property and told them that the proposed improvements would cost between two thousand and twenty-one hundred dollars, and that he could raise that amount for them on the property. For some reason not disclosed, however, it was concluded to borrow \$1500 on the property as a first loan, Dausman testifying that he intended to raise the other, when necessary, by a second deed of trust. Thereupon he agreed with them to raise \$1500 for the proposed improvements by means of a deed of trust on the property, and had this deed of trust and the notes drawn up, went out to the residence of plaintiffs with a notary public, and had them sign and acknowledge the deed of trust and sign the notes and they were all delivered to him. He thereupon placed the deed of trust on record and had Grimm, who at times did clerical work in his office, indorse the notes "without recourse." Grimm never paid anything for them, had no interest whatever in the matter and is designated in the testimony of the several witnesses as a "straw man." This all occurred in April, 1905.

One of the plaintiffs testified that Dausman told them at the time of the execution of the deed of trust

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and of the notes that the money to be raised on the deed of trust could not be used for any other purpose than for the rebuilding of the house, converting it from a one-story into a two-story structure. Dausman neither furnished nor raised any money on these notes for that purpose nor did he make any arrangements for carrying on the proposed improvements, although repeatedly requested to go on by plaintiffs, until the summer of 1909, when he appears to have contracted with two men named Smith and Giesecke to remodel the house. As the evidence tends to show, their contract price was from two thousand to twenty-one hundred dollars. Smith and Giesecke began the work and when it was practically completed employed an attorney, former Judge Jesse A. McDonald, to file a lien on the property and commence proceedings for its enforcement, as none of the work done or material furnished by them had been paid for. They informed Judge McDonald that there was a deed of trust on the property, and on the suggestion that one Barney Schwartz, an attorney at law of St. Louis, held the deed of trust for collection or held it for some client of his, Judge McDonald called on Mr. Schwartz about the 1st of December, 1909, and told him that he represented Mrs. Veney, the owner, as also the contractors, and wanted to examine the deed of trust and the notes. Mr. Schwartz told Judge McDonald that they belonged to a man by the name of Gould but that he (Schwartz) did not at that time have possession of them but would have them later. Judge McDonald asked him when he could see them and Mr. Schwartz told him he could do so in a short time. About two weeks afterwards, Judge McDonald went back to Mr. Schwartz's office and the latter showed him the papers, the notes and deed of trust, including among the papers, a note of date September 14, 1907, signed by George Dausman, wherein he promised, one day after date, to pay to the order of J. S. Gould \$515, with interest from date at

six per cent per annum. The note, after the above reads:

"Payable at the office of Geo. Dausman Real Estate Co.

This note is secured by deed of trust. Geo. Dausman.

On property ~~4116 Nth. Taylor Av.~~
2614 Glasgow Ave."

A payment of interest, \$30.90, of date September 15, 1908, was indorsed on this note. After examining the papers and making a memorandum of them, Judge McDonald, as he testified, told Mr. Schwartz that the transaction seemed a suspicious one to him; that the owner of the property had gotten no benefit from the deed of trust; that it would have to be contested. Mr. Schwartz appears to have taken umbrage at this and the interview ended. Mr. Schwartz testifies substantially as does Judge McDonald as to the call on him, and testified that after he showed Judge McDonald the deed of trust and the notes, Judge McDonald said: "This whole thing is a fraud." Whereupon Mr. Schwartz remarked: "We will not discuss this thing further, Judge." That, according to Mr. Schwartz, was the end of their interview.

It appears that about the time Mr. Gould had placed the Dausman note and the deed of trust and notes of plaintiff in the hands of Mr. Schwartz, that Dausman was confined in jail in St. Louis, and that Schwartz and Gould went up to the Four Courts and saw Dausman and spoke to him concerning his own note and the deed of trust; that Dausman told him he was going to pay Gould. Mr. Schwartz told him that he would write to Mrs. Veney to see what condition the matter was in, because he (Schwartz) was worried at the time, as Dausman was then in jail under what he (Schwartz) considered a similar matter, as he testified, and he wanted to see how his client, Gould, stood with regard to the deed of trust. He thereupon wrote to the

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plaintiffs, who were sisters and living together on the property, to the effect that he represented the holder of the deed of trust on their property and asked them to call at his office at their earliest convenience, the letter concluding: "It is necessary to your interest and the interest of my client that you call immediately." This letter from Mr. Schwartz to plaintiffs was the first the latter heard of the deed of trust being in the hands of anyone other than Dausman. Mrs. Veney appears to have called on Mr. Schwartz a few days later and told him of the transaction between herself and sister and Dausman; told him she "didn't know how they owed that money;" that Dausman had always said he was going to give them a statement but had never done so. Whereupon Schwartz undertook to get one from Dausman; met him in the hall of the office building in which he and Schwartz had their offices and told him to give Mrs. Veney the statement he had promised. Dausman, apparently sometime after April 20, 1909, delivered to Schwartz for the plaintiffs a statement of account, of date March 26, 1909, wherein he claimed to have expended \$37.05 for "repair on roof" and "improvement of Montgomery street," and \$252.21 for filing papers, advertising, court costs, sheriff's bill, "R. Deed" and "attorney," a total of \$289.36, on which he gave a credit of \$33.20 for "cash paid for costs."

Mrs. Veney testified that she had never authorized Dausman to employ an attorney for her and had never heard of these items until she saw them in this statement and knew nothing about them. About a month after Judge McDonald had called on Mr. Schwartz, Mr. Joseph A. Wright called on him concerning the transaction, acting as he told Mr. Schwartz, as representative and attorney for the plaintiffs. Some while after this, when does not clearly appear, Mr. Schwartz inserted an advertisement in an evening paper published in St. Louis, that the collateral to this note of Mr.

Gould's would be sold at the court house in the city of St. Louis, ten days after the date of the notice. How often this was published is not in evidence. Mr. Schwartz testified that he handed Dausman a copy of the advertisement cut from the paper and that he had mailed a copy to Mrs. Veney through the United States mail in a stamped envelope. Mrs. Veney and Mr. Dausman denied ever having received any such notice, and Dausman testified that he had never seen the notice and never heard of the sale until it was over, although his office was on the floor immediately above that of Mr. Scharwtz and they had had more or less business dealings with each other.

Mr. Schwartz admitted that although he knew before the sale that Judge McDonald was representing the contractors and had, on the first occasion of their interview, told him he represented plaintiffs, and knew that Mr. Wright represented them, further admitted that he had never notified either of them or these plaintiffs of the intended sale of the collateral to the Gould note. At this sale Max Haas, one of the defendants, purchased the collateral to the Gould note, that is, the deed of trust, the principal and interest notes, for about \$580.50, that being a little over the amount of the Gould note, its accrued interest and the cost of advertising and sale. Prior to this sale it appears, according to the testimony of Mr. Schwartz, Mr. Haas came to the office of Mr. Schwartz and asked him about what the property was worth, and concerning the transaction, particularly whether the paper, meaning the principal note, had been "handled" before maturity, which Mr. Schwartz assured him was the fact. He also asked concerning Gould and who he was, all of which Mr. Schwartz informed him. He further asked Mr. Schwartz at that time whether he had sent notices to those several parties of the intended sale of the collateral to the Gould notes, that is the deed of trust and the notes of plaintiffs, and Mr. Schwartz told him

he had, and Mr. Haas asked to look at the deed of trust and notes. Mr. Schwartz was asked if he had told Haas that the notes and deed of trust had been pledged by Dausman without authority of plaintiffs. He answered that he did not know as to that, because he had had a conversation with Mrs. Veney before that in which they tried to square up the differences between Mrs. Veney and Dausman regarding the \$256.06 represented in the statement before referred to. Admitting that he had talked with Mrs. Veney and with Judge McDonald and with Mr. Wright prior to the sale about the matter, he was asked: "Were you not satisfied at that time that Dausman had pledged this note and deed of trust without any authority from the plaintiffs?" He answered: "Well, that would be more or less a conclusion." He was asked if he had not told Haas anything about that. He answered that he did not think he went into that feature of it; did not recollect that he did. We will set out Mr. Haas's version of this conversation later.

Mr. Schwartz testified that his connection with the matter ended with the sale of the collateral to Haas. Asked by the court whether, when Haas asked him if the \$1500 note had passed to Gould before maturity, and he told him it had, whether he did not then know that plaintiffs and Judge McDonald, representing the contractors and builders, were questioning the transfer of the note and claiming it as a fraud, he answered that he knew that. Asked by the court why he did not tell Haas that, he answered that he did not think that was material; "I didn't want to spoil the sale of the note." By the Court: "You didn't want him to buy a note he couldn't collect? A. I believed he could collect it. Q. When he was asking you for information why didn't you give him all the information you could? A. When he asked me whether I believed this transaction was square, so far as Gould was concerned, I told him positively, yes, sir. Q. He asked you whether

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it was square? A. Yes, sir. Q. You told him, so far as Gould was concerned, it was? A. Yes, sir. Q. Did you tell him, so far as Dausman was concerned, it wasn't? A. I intimated it. Q. That you knew the thing was in question? A. I won't say that. Q. You say you intimated it? A. Perhaps. Q. What did you say? A. I don't recall that. Q. How did he get the exact amount due on this note? Why did he bid that amount? A. I believe I announced before the sale that the property would have to bring at least so much money. Q. And he paid just that amount? A. No, sir; I think he paid slightly over that. Q. You had told him the deal was a square one so far as Gould was concerned? A. Yes, sir. Q. How did he come to ask you that question? A. I presume because of the difference in the amount. Q. Did he ask you whether it was bona fide? A. I believe he did. I told him Miss Veney had been up to my office, in fact, had been there several times, and I had asked her whether she had executed that paper, and all those facts, and she acknowledged to me she had, and then I knew if Gould was an innocent purchaser for value before maturity, I concluded the transaction, so far as Haas was concerned, was proper. Q. If Gould knew at the time he took the note that the note was the note of the plaintiffs put in Mr. Dausman's hands to be negotiated to raise money to pay on the property, and he only got \$500 on it, or he only advanced \$515, you knew that? A. Yes, sir. Q. And did Haas know that? A. I presume he could have seen that. I don't recall that feature of the transaction, although I should say perhaps he did; I suppose he saw it, as a business man. Q. You explained that? A. Yes, sir; possibly; he is a business man."

Beyond acting as trustee in advertising the sale under the deed of trust, as attorney for Mr. Haas, Mr. Furth does not appear to have had any connection whatever with the transaction.

Returning now to the transaction by which Mr. Gould came into it, according to the testimony of Dausman, this deed of trust and the notes of plaintiffs were in his possession for nearly three years and soon after the execution of the deed of trust, he says he found, on getting the title examined, that plaintiffs did not have a clear title, and all proceedings for the negotiation of the notes were stopped for the time, Dausman in the meantime keeping the deed of trust and notes in his possession. (Beyond this statement of Dausman, there is not a particle of evidence that there was any flaw in plaintiffs' title. The inferences are all the other way.) It appears further by his testimony that until Dausman heard that Schwartz had written a letter to the plaintiffs, no demand had ever been made on them for the payment of their notes and deed of trust, and when Dausman contracted with Smith and Giesecke to rebuild their house, he had not told them anything about this deed of trust being pledged to Gould, although he knew that these contractors had never been paid anything on account of their work about the house.

Dausman and Gould had been acquainted several years prior to 1907, Dausman having acted for him in making a loan on some property in Kirkwood, the loan amounting to \$500. That loan had been made about three years prior to the 14th of September, 1907. The Kirkwood loan was paid off early in that month, Dausman having collected it some little time before this 14th of September, how long before that is left entirely in the dark, neither Dausman nor Gould fixing the date. At all events, after its collection Gould appears to have called on Dausman about the matter and Dausman told him (Gould) that he (Dausman) could use the money in another place, and proposed to give his personal note to Gould for the amount, \$515, and to put

up this deed of trust and the notes of plaintiffs as collateral for the payment of his own note.

Dausman testified that he could not remember the conversation that took place between him and Gould at the time but that he thought Gould asked him if this collateral was good enough for the amount, that is for the \$515. Dausman told him he thought it was. He handed Gould the deed of trust and the notes of plaintiffs; did not know whether Gould read them or not; did not think Gould asked him how it happened that he (Dausman) was named as trustee in the deed of trust and still held the notes; did not ask who Grimm was, although Dausman testified that Gould did not know Grimm personally; did not ask Dausman any questions about how those notes happened to be payable at his (Dausman's) office. Asked how he (Dausman) happened to give Gould a one day note, he answered: "Because it was an indefinite time." "It was an indefinite time," said Dausman, because he did not know how long he wanted it and just made it one day after date without specifying any time. When Gould came down to get this individual note of Dausman's it was signed up. They had talked about the matter before that so that it was all signed up when Gould came in the day upon which it was delivered to him. Dausman, called as a witness by the plaintiffs, gave the above testimony in his direct examination.

While under cross-examination by counsel for one or more of the defendants, Dausman was asked by the court whether, when he passed these notes of the plaintiffs and the deed of trust to Gould, he (Dausman) was indebted to him in the amount of his note to him. He said that he was. The court asked him if he had borrowed the money from him at that time. He said, "Yes." The court asked him if the pledge by him to Gould at that time was to secure the debt "that you then owed him?" Dausman answered: "It was a payment he got." That he gave Gould the note for the

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\$515, and that was the money that came to him (Gould) from a loan in Kirkwood, which he (Dausman) had collected and which was due Gould, and that instead of giving Gould the money he (Dausman) gave him this \$515 note and gave him the notes and deed of trust of the plaintiffs to secure the payment of that note; that Gould asked him if that security was good and he said it was. That Gould did not ask him whether he (Dausman) owned those notes or not; that Dausman had not told him whether he owned them or not; that he had not asked him and that nothing was said about it. The court asked him what assurance Gould had that he (Dausman) owned the notes. Dausman answered that he did not know. The court said: "He didn't ask for any," to which Dausman answered, "No, sir." The court asked him if he had given Gould any explanation as to how he came in possession of those notes. He answered, "No;" that nothing was said about it; that he had not told Gould that he had himself loaned this money to these people and Gould had not asked that. The court asked him if, generally, he explained such matters to people and told them whether notes belonged to him or not. He answered that if they asked him the question he did, or he would say: "We have such and such a paper here, and we give you this. They hardly ever ask if we own them or not;" that in this case Gould had not asked anything of the kind.

His cross-examination resumed by counsel for defendants, Dausman stated that these notes of the plaintiffs were indorsed in blank. Asked whether they were due at the time or had matured, he said: "No, sir; I don't know; I don't think they had;" that they had some few months to run. Asked if at the time Gould had left the Kirkwood deed of trust to be collected, whether anything had been said about his using the money himself, he answered, "No," but that after this Kirkwood loan had been paid he told Gould that

he could use that money elsewhere. Gould asked him whether the property was worth the money, and Dausman told him he thought it was. The court then asked him if prior to the time he gave these notes as collateral security to Gould, Gould had authorized him to make use of the money himself. He answered that he had not done so before that time. The court then asked him this: "He was there to get his money and you gave him this note instead of the money? You gave him your own note secured by those notes instead of giving him the money? A. I told him I could give him these collaterals for the amount of the loan." The Court: "He came to you to get the money you had collected from the Kirkwood loan? A. Yes, sir." The Court: "You didn't have it to give to him? A. No, sir." The Court: "And instead you gave him your note and these notes as collateral security to secure the payment of that note due in one day A. I think I did have the money at that time; it was only a few days after I got it." Asked by counsel for defendants if he was ready to pay the money at that time he answered: "Yes," but that he had told Gould he could use the money elsewhere; could place it elsewhere, and he gave him his own note and this deed of trust and notes as collateral security.

On re-examination Dausman was asked why he gave his personal note and he answered that he did not know. Asked if he could bring into court a bank book showing that he had \$500 or anything like that sum on deposit on the 14th of September, 1907, he answered that he did not think he could; that he might have had more than that; that he could not produce any bank book now because he could not tell what bank he was doing business with at the time but knew he did not have the \$515 in his pocket. Asked to produce his bank book and show it, he answered that he would have to find out what bank he was doing business with at the time, whereupon the court asked the witness,

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that if this money belonged to Mr. Gould, money he owed Mr. Gould, which he had collected on the Kirkwood loan, was left with him by Gould to be loaned out again, as the witness had said he told him he would place it again, why Dausman gave his individual note to Gould for it. This witness answered: "It may have been I said that I could use it myself; I may have told him that."

Mr. Gould's account of the transaction is about as follows: He was conductor on a passenger train on a railroad and had been for twenty-three years past; had been acquainted with Dausman for a number of years prior to this transaction; became acquainted with him sometime about 1905; saw an advertisement by Dausman in the paper for money to loan, five or six hundred dollars, or something like that; that he wanted to get to loan out; went to Dausman and loaned through him \$500, secured by deed of trust on some Kirkwood property; that was a three-year loan, which fell due along about September 1, 1907; had been loaned then about three years. The loan was payable at Dausman's office and Dausman received payment of it and notified Gould of that fact. Asked how Dausman happened to execute this \$515 note, payable one day after date, witness said he did not know that he could explain it, except that it is usual and customary for a man to give a note for money loaned. When he went in to see Dausman about the money after it had been collected, Dausman told him he had the money and could place it for him if he (Gould) did not need it; that he could place it for him on another loan, whereupon Gould told him to place it. Dausman then executed the note before referred to for \$515, Gould, as he testified, understanding at the time, that Dausman was going to use it for the improvement of the property on Glasgow avenue, described in the deed of trust; that was his understanding when he accepted Dausman's note and the note for \$1500 and the deed

of trust made by plaintiffs. Asked if he had testified to anything like that before a commissioner when his testimony had previously been taken he said he did not know and did not remember now but that "it seemed like that was his understanding" when Dausman gave him his personal note and the note for \$1500 and the deed of trust. The court asked him if he knew that Dausman held that note for these plaintiffs. He answered that he did and that he had given him plaintiffs' note and the deed of trust as collateral to his (Gould's) own note, telling Gould that he (Dausman) wanted money "for the colored women to repair their house." The court asked him if he knew that Dausman was getting money on their note for that purpose. Witness answered, "Yes, sir; he gave me the note for \$1500 and the deed of trust as security." Counsel for plaintiffs asked him if Dausman had told him for whom he was raising money to improve the house. Witness answered that he thought he did. He was asked if he knew Dausman had not paid him the \$515. He answered that he did, but Dausman was going to apply that \$515 which he (Gould) was to loan him to the repairs of the house; that was his understanding from Dausman. At that time Duncan had in his possession this \$515 "to make a loan for me," said Gould. Thereupon this occurred in the examination of the witness: "Q. What he was really doing was paying you off, wasn't he? A. Paying me off? Q. Yes, sir; by giving a one day note? A. That I can't say. Q. What? A. That I can't say. Q. You didn't advance any money? A. No, sir; he had the money in his possession and gave me a note for \$1500 signed by Miss Veney and Taylor, and the deed of trust as security."

Asked if when Dausman's note was handed to him the number "4116 North Taylor avenue," had a line through it and 2614 Glasgow avenue inserted in its place, witness answered that it was in that condition

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when the note was handed to him and that the alteration had not excited his suspicion; that he had a deed of trust for some property on Kossuth avenue, west of Taylor, but not on Taylor; that he bought that from Dausman and had turned over the collection of that along with the collection of the Dausman note and the \$1500 note of plaintiffs to Mr. Schwartz as his attorney. The note on the Kossuth avenue house was for \$1200. He had gone to Mr. Schwartz with the papers because Mr. Dausman had referred him to Mr. Schwartz. When witness heard that Dausman was in trouble and in jail he had gone down to the jail with Mr. Schwartz to see Dausman about his (Gould's) matters. Asked if he could give the entire conversation between himself and Dausman at the time he took the note and deed of trust as collateral, he said that as near as he could remember Dausman gave him the note and paper, deed of trust, and he asked Dausman if it was absolutely safe and Dausman said it was. "That," said witness, "is about all that happened," except that he said "he wanted to use the money for improving this Glasgow avenue property;" that he had not said anything to him about wanting to have it for his personal use. Witness testified that he would not have loaned it to Dausman or to anybody else on a personal note and while he was giving his personal note, witness understood it was to be secured by the deed of trust and the \$1500 note. The collateral was sold at the east front door of the court house in the city of St. Louis, on the 15th of February. Witness attended the sale; had not notified the plaintiffs or Judge McDonald or the contractors, who were filing a lien on the property, of the sale. None of these parties were present on the 15th of February when the collateral was sold, as far as he knew; Mr. Schwartz was looking after the business for witness. After Dausman had given him the \$515 note, of date 14th of September, 1907, and it was not paid, he (witness) commenced

going to Dausman for it and dunning him for it and telling him he needed the money and Dausman put him off from time to time; had gone up to see these plaintiffs one evening about owning and holding their note and deed of trust but could not tell whether that was before or after Mr. Schwartz had written to them about it; it was something like a year prior to the date of the trial, which was the 10th of October, 1910.

On cross-examination witness stated that Dausman was the only man through whom he had loaned money; that when he called on Dausman, his understanding was that the Kirkwood loan had been paid and that Dausman had the money from the collection. It was perhaps a little while before that that Dausman had asked him for the loan of this money. Nothing was said at that time about the note or the security Dausman was to give, or whether he was to give any security for it—witness did not think there was. When he went down to Dausman's to collect this Kirkwood money, Dausman did not offer to pay it to him, made him no offer. He said he could turn the money for him or place it for him if he (Gould) did not particularly need it, and that Gould had allowed him to do, as he did not need it. When Dausman gave him his personal note for the \$515, there was nothing to excite his suspicion about it. What he wanted was the loan secured and he took Dausman's note because it was secured by the deed of trust and the note. It made no difference to witness whose note it was as long as it was secured.

On re-examination by counsel for plaintiffs, this witness, Gould, admitted that when his testimony was taken before a commissioner, he had stated that after the Kirkwood loan was paid off he had a talk with Dausman, and Dausman had asked him if he (Dausman) could use the money, and that he had then answered, "Yes," and he now said that answer was correct; that they had spoken about Dausman using the

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money at different times when witness was down at his office and that Dausman had told him several times that if he (witness) did not need it when it was paid he could place it for him. He also admitted that in the testimony he gave before the commissioner, when asked what he had told Dausman when Dausman had asked him if he could use the money, he had answered, "Of course he could use it if he could furnish collateral;" that he had the money to loan and wanted to make out of it all he could. Dausman said he could use it and would fix up a note and handed him the papers. The papers were all made out when he went to Dausman finally and Dausman handed them to him for the money he had collected. That might have been a week or two weeks and might not have been more than a day or so after Dausman first told him about collecting the money. Asked why he had not said anything in his testimony before the commissioner about Dausman telling him he was going to use that money for a building loan, he answered: "The question perhaps wasn't put to me." Asked if he had testified that Dausman said he wanted the money for his personal use, he answered that he did not think that he had; that he would not have loaned it to him for his personal use. Asked by Mr. Furth, "When you say there that Dausman said that he could use the money, that doesn't mean that he was going to use it personally? A. No, sir; I wouldn't take it that way; I took it for granted that he would place it for me and furnish me collateral. . . . That was the understanding, that he was going to use it and place it as a loan and furnish me collateral. I didn't understand him that he was going to use it for his personal use."

Recalled for examination by the defendants, Mr. Gould was asked to state what the transaction was when these notes were pledged to him by Dausman, as nearly as he could remember to state what hap-

pended. He answered: "I understood that to be a straight, honest and bona fide transaction." The Court: "Which? A. When Dausman delivered me the \$515 note and the \$1500 note and deed of trust. Q. You understood what? A. I understood it to be an honest and honorable transaction; the \$1500 note and deed of trust was to secure me on the \$515 note. I took that to be an honest and honorable transaction on the part of Mr. Dausman." By Mr. Furth: "What did Mr. Dausman say to you and what did you say to Mr. Dausman on the occasion when that pledge of those notes was made? A. He gave me those papers to secure me. Q. Yes, sir; what did he say to you? A. He said: 'These are absolute security for this note of \$515.' Q. Did you look at those notes and that paper at the time? A. Yes, sir. Q. Were these notes (indicating) in that condition at that time? Turn them over and look at them. Have they been altered in any way? A. Not as I know of. Those were signed by Henry J. Grimm, without recourse; I don't know about his (indicating), but that (indicating) was on there. (What is referred to is not clear by the record). Q. They were indorsed in blank at that time? A. Yes, sir. Q. Were they due at that time, do you know? A. I can't say. Q. According to the dates they matured April 26, 1908, and you got them September 14, 1907, didn't you? A. Yes, sir. Q. Now, what information, if any, did you have about the transaction between Mr. Dausman and Mrs. Veney and Mrs. Taylor, what knowledge or information? A. I don't know that he gave me any information about them. Q. Did you ask him anything about them? A. No, sir, I didn't; I didn't ask him anything about them at all. He simply said that their paper secured me. Q. You had this \$515 coming from him? A. Yes, sir. Q. And took this as security for your debt? A. Yes, sir; took the \$1500 note and the deed of trust as security."

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Mr. Gould further testified that after receiving the note from Dausman, Dausman had paid the \$30.90 to him which was indorsed on the back of the note and that because he had paid that year's interest he had not pushed him for collection for the year following; that after that year was out he began to crowd him for the money and Dausman kept putting him off from time to time. He was asked by the court if he had asked Dausman if he owned that \$1500 note or not. He answered, "No, sir; I didn't; I didn't ask him if he owned it;" that he took it for granted that the transaction was absolutely honorable and square.

So much for Mr. Gould's account of the transaction.

Mr. Haas testified that he had purchased the deed of trust and the principal and interest notes at the sale on February 15, 1910; that before the sale he had inquired whether the note had been pledged before maturity; also inquired whether there was a chance of their being forged. Mr. Schwartz assured him that there was no forgery. Witness asked him what was wrong with the paper and Schwartz said there was something in a deed from the grantor to these grantees, Veney and Taylor, and there was another party. Witness then looked at the deed as recorded at the City Hall, consulted his attorney, and found, in his own opinion at least, that plaintiffs had a perfect title and concluded that the deed of trust, that is the security for the \$1500 note, was perfect, and on that conclusion went to the sale and bid when the deed of trust and notes were put up and purchased them. Asked if he had inquired whether Gould had given any value for his pledge he answered, "I made every inquiry necessary to assure myself that the transaction was in every way bona fide." The Court: "That is not an answer." By Mr. Furth: "Did you inquire whether Gould had given any value for his pledge? A. I did. Q. What information did you have on that subject?"

A. I was shown the note which Gould had. Q. As to what value he gave for the pledge? A. Five hundred and fifteen dollars, I understood. Q. Who told you that? A. Schwartz. Q. Was that before the sale?" Witness answered that it was. He further testified that neither plaintiffs nor any one for them had ever tendered him any money for the surrender of these papers before the beginning of the suit.

On cross-examination he testified that he was a dealer in real estate mortgages and in real estate; dealt a good deal in "seconds" and "firsts;" had been in the business since 1902; did not do much real estate business, apart from purchasing deeds of trust. Witness's office is on the second floor below that of Mr. Schwartz and he went into the latter's office to inquire about this deed of trust; had simply asked Mr. Schwartz about the validity of the transaction, whether the transaction was all right as between Gould and Dausman, whether the deed of trust was a forgery or whether it was a bona fide deed of trust, and Mr. Schwartz had given him a satisfactory answer in both instances; that he asked Mr. Schwartz about the title and Mr. Schwartz referred him to a title examiner, whom he saw, and concluded that the title was good in these plaintiffs. Asked if he did not know at the time that Dausman had been in jail for some such similar offense, he answered that he did not know there was any offense connected with this transaction; that if he had known it he would not have touched it; that he knew Mr. Dausman had been arrested. Asked if he did not know that he had been arrested for taking money from people on deeds of trust, he said: "I don't know about that." Counsel for defendants objected to this line of questioning, arguing that if Dausman was in jail for taking somebody's money, it did not follow that three years before he had done the same thing. To which the court replied: "No, sir. He says he started to find out and inquired whether this was a bona fide note. Now, then,

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what he inquired is one thing and what he knew may go in to show whether he availed himself of all the sources he had of ascertaining. I think that may go in." This was objected to by counsel for the defendants and exceptions saved, no ground of objection, however, being stated. He was then asked if he did not know that Dausman had been arrested on the charge of appropriating the money of his customers before that. This was objected to, no ground stated, objection overruled and exception saved. Witness answered: "You asked if I knew he had been arrested?" Counsel: Q. "Yes, sir. A. I knew Dausman had been arrested; I think it was before that time." Asked if he had looked at the \$515 note before the sale, he said he thought he had. Asked if he had noted the erasure on it by scratching out 4116 North Taylor and writing 2614 Glasgow under it, he said he may have noticed it but that it did not excite his suspicion; had noticed that it was a one day note; noticed that Dausman was the trustee in the deed of trust but that would not have made any difference to him; noticed that the notes secured by the deed of trust were payable at Dausman's office but that did not "hurt the note any;" had noticed all that before the sale; had looked at the property before the sale

Witness testified that he was familiar with the fair market value of real estate in St. Louis and was of the opinion that on the 15th of February, 1910, the date on which he purchased the collateral, it was reasonably worth between twenty-seven hundred and fifty and three thousand dollars, that is, in the shape it was at the time he saw it, and provided everything was paid, with no debts against the property and assuming the title was perfect.

This is substantially the testimony in the case.

At its conclusion the trial court found for plaintiffs and entered up a decree directing the cancellation of the deed of trust and of the note securing it. From

this the defendants Haas and Furth, as trustee, interposing a motion for new trial and excepting to its overruling, duly perfected their appeal to this court. Pending the appeal here, the plaintiff Sarah Veney died and her death being suggested the cause proceeded, so far as respondent is concerned, under the provisions of section 2075, R. S. 1909, in the name of the surviving respondent, Laura Taylor.

REYNOLDS, P. J. (after stating the facts).—As this is a suit in equity we, an appellate court, as in duty bound, have gone over all the testimony in it, as abstracted by counsel for the appellants, and have set out the material parts of it. While in such a suit we are to weigh the testimony ourselves and determine the cause from our conclusions on that testimony, and are not bound by the finding on the evidence which has been made by the trial court, it is and always has been an established rule in all our appellate courts, to pay great deference to the conclusion arrived at by the trial judge on the facts. Obviously this is a correct rule of decision. He has before him the witnesses; he has heard what they have to say; has seen their manner in testifying, and that has everything to do in determining the credit to be given, for it is not always the spoken word that conveys the real truth. He has not only observed them but, as shown by the record in this case, has followed all of their testimony with great care. Not always satisfied with the testimony elicited from witnesses by counsel, but in an endeavor to arrive at the true facts in the case, the learned court in this case has questioned the witnesses himself. So that it is obvious that this case was tried with very great care by not only a learned but by one of the most experienced trial judges in the State. We have no hesitation whatever, therefore, in applying the rule which we have before stated to its determination, namely, to accept the conclusion on the testimony ar-

rived at by that court. With that conclusion before us, as evidenced by the decree which he ordered entered and in the impression made upon us by our own examination and consideration of the testimony, we see no reason to disturb the judgment of the trial court. That a gross fraud was attempted to be perpetrated upon these plaintiffs, is beyond question. The perpetrator of that attempted fraud in the first instance was George Dausman. But as usually happens in cases of this kind, Dausman could only succeed in perpetrating the fraud by the connivance and co-operation of others. He had that here, through Gould and Haas. Fraud is established and chargeable to parties if, with the means of acquiring knowledge, they shut their eyes to all the surrounding circumstances and, claiming that they did not know of the fraudulent acts, seek advantage to themselves through those acts. If courts of equity permitted this kind of a defense, they would surrender their great function of cutting through all devices and pretenses to prevent or overturn the fraud.

It is said that the defendant Gould is a man who is ignorant of ordinary business transactions. His testimony contradicts any such plea. He had been a conductor of a passenger train on one of the largest railroads of the country for many years, and it is not usual for men of simple minds and lacking in ordinary business knowledge and common sense to occupy such responsible positions long. As we read his testimony and as the trial court undoubtedly understood it, he had turned his money over to Dausman to loan on real estate in Kirkwood. That loan fell in, Dausman collected it and, while he notified his customer, Gould, that he had collected the money, he never offered to pay it over to Gould, but told him that he wanted to use the money himself. True that Gould says that Dausman told him he wanted to invest it again, but how? Not by reloaning, but by using it in

making repairs on a house and giving his own note for it and putting up as his collateral the note and deed of trust which he practically told Gould he did not own, for Gould swears that Dausman told him he was going to apply the \$515 he had of Gould's money to improving the property of plaintiffs. Conclusive evidence was before Gould that nearly three years after the execution of the deed of trust, Dausman had not himself raised the money for the purposes for which that note and deed of trust were given. The very fact that Dausman then had the papers was so against all business ideas, that Gould should have been put on his guard. The truth seems to be that Dausman had converted this money of Gould's to his own use and did not have it available to turn over to his customer, and that Gould, realizing this, did the best he could to extricate himself from the unfortunate dilemma in which he was placed. The only thing he could do was to take what Dausman offered him. That was Dausman's own personal note secured by a pledge of the deed of trust and the notes which had been executed by these plaintiffs; and he took plaintiffs' deed of trust and notes "as collateral" to Dausman's own note, those notes then almost due, nearly three years old, and still in the hands of Dausman, the trustee, the improvements not made. Gould himself admits that he knew that this was a building loan; that the money was to be used for the improvement of the property; that Dausman told him that he wanted to put this \$515 into "the improvement of this property." That was ample to have excited inquiry on the part of Gould as to whether the balance of the \$1500 had gone into the improvement of the same property, and if not, where it was to come from. It certainly was sufficient to put Gould on inquiry as to whether Dausman, holding this note as a trustee for a specific purpose, had executed the trust up to that time, and was owner of the notes. We do not believe, reading all of the testi-

mony in the case, that Mr. Gould was an innocent purchaser in this transaction to the extent of his acquisition of this deed of trust and of these notes, shielded by the innocence that is necessary to give one that character in a court of equity. Nor is his conduct after he had acquired this deed of trust and these notes as collateral consistent with fair dealing. Not that he himself acted. But the attorney in whose hands he placed those papers for collection, Mr. Barney Schwartz, did act. Mr. Schwartz was informed by Judge McDonald and by Mr. Wright that these plaintiffs had received nothing on account of this deed of trust. He was informed by Mrs. Veney that Dausman had never furnished the money to make the improvements, nor rendered an account of his expenditures in connection with the improvement of the house. He knew that these attorneys and these plaintiffs were challenging the deed of trust and its notes. Without giving them any chance to protect themselves and prevent intervention of another, he advertised these notes and deed of trust for sale and sold them to the defendant Haas. Every step in this transaction then, as far as Gould was connected with it personally or through his attorney, from its inception to the time of the sale of the collateral is surrounded with such facts and circumstances as inevitably leads us to the conclusion that Gould knew of the infirmity of Dausman's title to the deed of trust and of the notes which he purported to convey to him as collateral for his own note and as between Gould and these plaintiffs it cannot stand for a moment's inspection or the slightest scrutiny, and that after acquiring them, through his attorney, Mr. Schwartz, he endeavored to put them beyond the reach of plaintiffs by a sale to a pretended innocent party is clear.

When we come to the relation of the defendant Haas to the matter, while there is not as much active

participation in the fraud attempted to be perpetrated on these plaintiffs as is shown in the acts of Gould and his attorney and Dausman, Mr. Haas is in the position of any other man who, with all the means before him of acquiring information, blindly closes his eyes and is satisfied to find out as little as possible in connection with the transaction in order that he may occupy the position of an innocent purchaser for value and without notice. One who has the opportunity to know and inform himself is bound to do so. When he fails to do so he cannot use his failure and his pretended lack of knowledge and of information and of participation as a club with which to strike down innocent parties and as a means of depriving those parties of their property and of their just rights. He says he has been in the business of buying deeds of trust for several years. When he is offered this one for \$1500, pledged for \$515, evidenced by a one day note, all he asks is whether the \$515 note is genuine and whether the title of the maker of the deed of trust is good. He makes no inquiry as to the \$1500 note, nor as to the right of Dausman to pledge it for his own note. Shuts his eyes as to all that, although as a business man he surely knew that such a transaction was unusual. His claim of innocence is not borne out by the evidence of Mr. Schwartz, who said, in answer to a question by the court as to whether he had told Haas that so far as Dausman was concerned, that the transaction was not square, that he "intimated it." Mr. Schwartz and Mr. Haas occupied offices in the same building and seem to have been pretty well acquainted with each other for some time. Such an "intimation" should have been sufficient to a man of Mr. Haas's occupation and experience. In other words, all of these parties here, except Mr. Furth, who was a substituted trustee and against whom there is no evidence of any kind of lack of good faith in the transaction, cannot be permitted by a court of equity to hold on to this deed of trust

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and the notes and to derive any advantage from the alleged purchase of them which a court of equity will acknowledge.

Counsel for appellants claim that the petition is defective and fails to state a cause of action. We do not agree to this. Its facts may be defectively stated but it states a cause of action and a good one, of which a court of equity will take cognizance. All of the testimony was before the trial court and is before us. Not a suggestion was made during the progress of the trial that any of the testimony offered was out of line with the averments of the petition in the case. Not a suggestion was made that the testimony offered in the case was not responsive to the issues tendered and, as said over and over again by our courts, following the direction of our statutes, these objections come too late when made in an appellate court.

Counsel for appellants argue that it appears from respondents' evidence that Dausman, in performing his contract, expended \$256 on behalf of respondents, in clearing the title to their property, and that he unquestionably has a lien on the notes in his possession and this interest was capable of being pledged and that Gould and his vendee, Haas, are undoubtedly entitled to this out of the note, regardless of the view the court may take of the claim for the whole of the \$575. We are unable to satisfy ourselves on any view of the evidence that the \$1500 note is subject to any of these claims. We have before us the account which Dausman rendered to respondents and are unable to identify, either from the account itself or by any evidence concerning it, any of the items in it as within the expenditures contemplated when the deed of trust and notes were executed.

It is further urged that respondents should have offered to pay what was due, if this is a bill to redeem. Conceding, however, that it is not a bill to redeem but a suit to cancel the deed of trust and notes, counsel

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for appellant urges that before the suit was brought respondents should have either paid or offered to pay any sum due, and that failing to give appellants an opportunity to accept or decline, they had needlessly mulcted appellants in the costs and expenses of the action. If we correctly comprehend the position of counsel, it is that a tender before suit, or in the petition, an offer to pay whatever was due, should have been made. Neither is necessary. In the first place, respondents never admitted that they owed anything. In the second place, even on the theory of appellants, that something was due, the amount was entirely a matter of conjecture, certainly of dispute. In the third place, and conclusively against this claim, this is a suit in equity. In the petition, after praying for specific relief, plaintiffs pray for "such other and further relief as may seem just and proper in the premises. Plaintiffs further aver and state that they will comply with all orders, judgments and decrees of the court and will pay such amounts, if any, as the court may order, adjudge and decree to be due the defendants or either of them." This meets all the requirements of the case—that is, it is an offer to do equity. Neither a tender or plea of prior tender was necessary. [Whelan v. Reilly et al., 61 Mo. 565, l. c. 570; Kline v. Vogel, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408.] In that case, at page 250, Judge BLACK, speaking for a majority of the court, says: "The petition shows a case where it is necessary to take an account of rents, taxes, repairs, etc., and contains an offer to pay whatever is due to Vogel. In such cases a tender before suit is not required, nor need the plaintiff bring any money into court until the amount due is ascertained." [See also Ailey v. Burnett, 134 Mo. 313, l. c. 320, 32 S. W. 1122, 35 S. W. 1137. and Carroll v. United Railways Co., 157 Mo. App. 247, l. c. 293, 137 S. W. 303, and cases there collated.]

We see nothing from the record in this case, look-

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ing at the petition, looking at the pleadings, considering the testimony, to warrant us in disturbing the finding of the trial court. Its judgment enjoining the sale under the deed of trust, cancelling that deed of trust and the notes, should be and is affirmed. *Norton and Allen, JJ.*, concur.

ELIZABETH PEPPERKORN, Respondent, v. ST. LOUIS TRANSFER RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted January 16, 1913. Opinion Filed March 1, 1913.

1. **RAILROADS: Action for Death from Backing Train: Violation of Municipal Ordinance.** In an action for the death of a person run over in a chute by a backing railroad train, evidence *held* to warrant a finding that the space between the top of the car farthest from the engine and the top of the chute was sufficient to make it practicable for a brakeman to ride on the top of that car, as required by Sec. 1857, Rev. Code of the City of St. Louis, which provides that a brakeman shall be on such car to give warning, etc.
2. **____: ____: Warning.** Ordinary care demands that a railroad company backing a train through a long dark chute, so placed as to invite persons to walk in it, should keep a lookout, and, if not practicable to have a man ride on the car farthest from the engine, to have one precede the train, to give warning of its approach.
3. **____: ____: Violation of Municipal Ordinance.** In an action for the death of a person run over in a chute by a backing railroad train, evidence *held* to show that the train was not manned with experienced brakemen at their posts, so stationed as to see and hear danger signals, as required by Sec. 1857, Rev. Code of the City of St. Louis.
4. **____: ____: ____: Substantial Compliance: Instructions.** In an action for the death of a person run over in a chute by a backing railroad train, the court charged the jury at the instance of defendant that if they found that the act of sending a brakeman through the chute was for the purpose of complying with Sec. 1857, Rev. Code of the City of St. Louis (providing that, when trains are being backed within the city, a brakeman shall ride on top of the last car farthest from the engine to give warning etc.), and if the jury found that such act was a

substantial compliance with the ordinance, their verdict should be for the defendant. *Held*, that while the propriety of giving the instruction will not be determined, nevertheless it having been given at defendant's instance, defendant is concluded as to the issues it submitted, by the verdict of the jury.

5. ____: ____: ____: **Proximate Cause.** In an action for the death of a person run over in a chute by a backing railroad train, evidence *held* sufficient to show that the cause of death was defendant's failure to observe Sec. 1857, Rev. Code of the City of St. Louis, which provides that trains backing within the city shall have a man on the car farthest from the engine to give warning, etc.
6. ____: ____: ____: **Sufficiency of Evidence.** In an action for the death of a person alleged to have been run over by a particular railroad train, which backed into a chute, it was shown that decedent's body was found under a car in the chute, one leg having been severed from his body and carried a distance of 60 ft. from the place where the body rested and in the direction in which the train moved, that blood and shreds of clothing were found on the forward trucks and wheels of the forward car of the train, and that no other train passed through the chute that night. *Held*, that the evidence was sufficient to show that deceased was killed by the particular train alleged.
7. **NEGLIGENCE: Action for Death: Evidence: Presumptions.** In an action for death, it is presumed that decedent did not commit suicide; and if there is any ground for presumption, it is directly against that of carelessness, which, usually being contributory negligence, must be alleged and proved by defendant.
8. ____: **Speculation and Conjecture: Instructions.** In an action for death, where there was no reason to suppose that the death occurred in any other way than by the means alleged, an instruction requested by defendant, cautioning the jury against speculation, conjecture and guess work and charging that, if they were unable to determine the cause of death, except by speculation, to find for defendant, was properly refused, for the reason that it would have been misleading.
9. **RAILROADS: Backing Train: Municipal Ordinance: Applicability.** Sec. 1857 of the Rev. Code of the City of St. Louis, providing that a brakeman shall be stationed on the car farthest from the engine of a backing train, and that certain warnings shall be given, etc., covers a switch track which runs through a long, low chute.

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10. ——. Action for Death from Backing Train: Violation of Municipal Ordinances: Instructions. In an action for the death of a person run over in a chute by a backing railroad train, an instruction given for plaintiff, submitting as a predicate of recovery a violation of Sec. 1857 of the Rev. Code of the City of St. Louis, which provides that when a train is backed within the city, a brakeman shall be stationed on the car farthest from the engine to give warning, etc., and that the train shall be well manned with experienced brakemen at their posts, so stationed as to see and hear signals, etc., *held* to be free from error.
11. APPELLATE PRACTICE: Objections to Questions: Trial Practice. An objection to a question which is not made until after the answer is given is too late and will not be considered on appeal unless the record shows that the witness answered so quickly and that there was no time to object.

Appeal from St. Louis City Circuit Court.—*Hon. W. B. Homer*, Judge.

AFFIRMED.

S. P. McChesney, T. M. Pierce and G. T. Priest
for appellant.

(1) The court erred in overruling defendant's demurrer to the evidence, because defendant's negligence as charged (a failure to warn) was not the proximate cause of deceased's injuries; it conclusively appearing that deceased knew of the presence and approach of the cars which it is alleged struck and killed him. *Davies v. Railroad*, 136 S. W. 720. (2) The court erred in overruling defendant's demurrer to the evidence, because there is no causal connection established by the evidence between deceased's death and defendant's alleged breach of the ordinance. *Holman v. Railroad*, 62 Mo. 562; *Warner v. Railroad*, 178 Mo. 125; *Beyerly v. Light Co.*, 130 Mo. App. 593; *King v. Railroad*, 211 Mo. 14. (3) The court erred in overruling defendant's demurrer to the evidence, because the ordinance in question does not apply to such a situation as disclosed by the record. *Railroad v. Mali*, 5 Atl. 90; *Rafferty v. Railroad*, 91 Mo. 33.

Wilfley, Wilfley, McIntyre & Nardin and *Taylor B. Wyrick* for respondent.

(1) The ordinances relied upon applied to the location of the accident and the circumstances surrounding it, as well as to any other locality in the city of St. Louis. *Merz v. Railroad*, 88 Mo. 672; *Grube v. Railroad*, 98 Mo. 330; *Bluedorn v. Railroad*, 108 Mo. 439; *Prewitt v. Railroad*, 134 Mo. 615; *Jackson v. Railroad*, 157 Mo. 633. (2) The causal connection between the deceased's death and the negligence complained of was established beyond a reasonable doubt, while the law requires only that there may be a basis for a reasonable inference that the negligence caused the injury, when the connection between the negligent act and the injury is clearly established. *Buesching v. Gas Light Co.*, 73 Mo. 219; *Settle v. Railroad*, 127 Mo. 336; *Cambron v. Railroad*, 165 Mo. 543; *Yongue v. Railroad*, 133 Mo. App. 141; *Goff v. Transit Co.*, 199 Mo. 694; *Johnston v. Railroad*, 150 Mo. App. 304. (3) Where there is a duty to give a warning of an approach of a train, and the warning is not given, and injury results to one on the track, the law presumes that if warning had been given the person would have gone from the railroad track to a place of safety, this presumption extending even to the case of a horse. *Roberts v. Railroad*, 113 Mo. App. 6. (4) The ordinance in question in this case has been construed to mean that the "well manning" clause requires the brakeman to be so stationed or on about the train, not only so as to see danger signals and hear signals, but also to give danger signals wherever they should be given, to avoid injury to persons on the track. *Harper v. Railroad*, 187 Mo. 587.

STATEMENT.—By her amended petition upon which the cause was tried, plaintiff charges that her husband, John H. Peperkorn, hereafter referred to as the deceased, was killed by being run over by a train of

freight cars operated by the agents of defendant. After a charge of general negligence on the part of defendant, section 1857 of the Revised Code of the city of St. Louis, being ordinance No. 22902, approved March 19, 1907, is pleaded. This ordinance, so far as here involved, requires that the bell of the engine of any car or train of cars, propelled by steam power, when moving shall be constantly sounded within the city limits, and that if any freight car, cars or locomotives propelled by steam power "be backing within said limits, a man shall be stationed on top of the car at the end of the train farthest from the engine to give danger signals, and no freight train shall at any time be moved within the city limits unless it be well manned with experienced brakemen at their posts, who shall be so stationed as to see the danger signals and hear the signals from the engine." Averring that this ordinance applies to and is binding upon defendant and was in full force and effect at the times mentioned, it is charged that the defendant carelessly and negligently violated it in three particulars: First, that while moving its freight cars against and injuring the deceased, defendant failed to sound constantly the bell of the engine attached thereto. Second, defendant while backing its cars within the city limits, failed to have a man stationed on top of the car at the end of the train farthest from the engine to give danger signals. Third, that defendant failed to have the freight train well manned with experienced brakemen at their posts, so stationed as to see the danger signals and hear signals from the engine. It is averred that the carelessness and negligence of defendant in violating this ordinance in the above particulars directly caused the injury and death of the deceased. Following this are averments seeking to bring the case within the last clear chance rule, but as this was not insisted upon at the trial, it is unnecessary to set them out. Damages are placed at \$10,000.

The answer, after a general denial, pleads contributory negligence on the part of the deceased.

A reply was filed, denying this.

A trial before the court and a jury resulted in a verdict for plaintiff in the sum of \$5000, from which, interposing a motion for new trial and saving exceptions to the overruling of that, defendant has duly perfected its appeal to this court.

Plaintiff and the deceased, John H. Peperkorn, were husband and wife, the deceased at the time of his death, then about seventy years of age, being in the employ of the Mississippi Valley Elevator & Grain Company as a night watchman at its elevator, situated between Madison avenue and Clinton street and near the Mississippi river, and within the limits of the city of St. Louis. It was the duty of the deceased to look after and make the rounds of the building during the night. Along the east side of the elevator building is what is known as a "car chute," constructed for the purpose of receiving cars for loading and unloading. Through this chute a railroad track runs in a straight line, nearly due north and south. The chute or passageway is closed at each end by doors, and is just wide enough to admit a freight car, leaving a space of about seven inches on either side of the car, between it and the projections on one side of the outer wall and on the other of the building. The space between the running board on the top of the car and the beam of the south doorway or entrance to this chute is about thirty-five inches. There are girders or stringers inside of the chute running at a pitch, that are higher at one end than at the other, so that after the door beam is passed there is a clear space between the running board on the top of the car and the lowest part of these girders, of forty-four inches on the east part of the top of the car, while on the west part of the top of the car there was a clear space between that part of the top and the girder of forty-four inches on one side and between

fifty-three and fifty-six inches on the other. The chute was one hundred and eighty-five feet long; long enough to hold five or six freight cars at one time. A witness for plaintiff testified that he had ridden through this chute on cars; had ridden through there on the top of a car but "had to lie down on the car, because it wouldn't clear me on top; it wouldn't clear me if I'd stand up on top of the car." If he had stood up he would have been knocked off, while by lying down on top of the car one could go through. This witness further said: "You have got to stoop down if you want to get through there," and that it is the same all through the chute. The track which goes through this chute, starting from the north of Clinton street runs straight south over Clinton and through the chute until near Madison street and then, and before crossing Madison street curves rather sharply to the west, and after crossing Madison street runs south. It is two hundred and forty-five feet from the north line of Clinton street to the south line of Madison. That is, after leaving the chute, the track curves to the west until it has crossed Madison street. This train came from the south and the cars were shoved north along it and through the chute. The south doors of this chute roll up to the top. The north doors, double doors, open outward on hinges, as shown by a plat in evidence and before us.

About half past ten o'clock on the night of the accident, a train made up of a steam engine with about ten freight cars, which had been brought across the river by ferry, was stopped south of Madison street, so that the end of the rear car of the train, the forward car as the train was pushed, was stopped about one hundred and twenty feet from this south door and on the south side of Madison street. The switch foreman, who will hereafter be referred to as the foreman, who was superintending the movement of the train then being operated by defendant, walking forward, found

the south door to the chute open but the north doors closed. Whereupon the foreman sent what he calls his "hind man" through the chute to open the north doors and to see that the way was clear. The foreman remained at the south entrance of the chute in front and to the south of it, until he received the signal "O. K." from his man, who was at the back or north end of the elevator, that meaning that the way was clear to shove the cars in. The foreman testified that at the same time there was a lantern shown up about the middle of this elevator (the witness by the word "elevator" referring to this chute in the elevator), down on the track in the middle of the entrance "as you shoved through it," said the witness. "My hind man passed through and both lights appeared to move backward to the north door of the elevator; both appeared to be put together to me, but who this was—I didn't speak to them, nor didn't see them, but I only seen the light. Those two lights looked to me to be at the door, in the entrance at the back end—at the north end of the elevator. I received an O. K. signal to shove the cars in." It appears that there was another track to the east of this elevator track and outside of the elevator and to the east of it and of this chute, and that there was a box car on this track, the north end of the car about on a line with the south end of the elevator and chute. The foreman walked from the entrance to the chute along and around this car to the east and over to another track further east and from that point signalled to the engineer of the train to come on. He testified that from the time he left the south entrance to the chute and until he walked around this car and got to the place from where he could signal the engineer of the engine, it took him about five minutes. Thereupon the train commenced backing into the chute. The engine pushed the train through until the two cars in front had gone clear through the chute and across and north of Clinton street. The train then

stopped. The "hind man," who had been sent through the chute by the foreman, uncoupled the two forward cars, and the engine pulled the remainder of the train far enough back in and through the chute to leave some six cars in the chute, whereupon the engine and the car immediately in front of it were uncoupled from these cars and went away about other business, leaving the five or six cars inside of the chute. While the foreman was standing at the point on the eastern track from where he signalled the engineer, he could not see his "hind man," whom he had sent through to the north end of the elevator, nor could he see into the chute at all, because, as he says, the car that was on the track east of the elevator was close to the door, and he could not see through that to the elevator. No one was on the forward car of the train as it was pushed through. No one was at the entrance of the elevator after the foreman left to signal the engineer. No one preceded the train through the chute. The foreman left no one at the south end of the chute, so that for about five minutes, he testified, there was no one there at all, except the "hind man," who was at the north end opening the doors. Asked if there was any light on the first car that was backed in, he answered, "No." Counsel for appellant then objected to the question as immaterial, there being no allegation of negligence in that respect. The objection was overruled and exception duly saved. On cross-examination by counsel for defendant, the foreman testified that those cars were moved in very slowly. That was practically all the cross-examination to which the foreman was subjected.

It appears by the evidence that it was one of the duties of the deceased to stop at call boxes located throughout the elevator and which communicated electrically with an office of the elevator company, and call up that office and thus advise the operator there that the watchman was in attendance on his duties. The

deceased, if on duty, should have put in a call at 12:30 o'clock. Not receiving the call the operator went to the elevator and in company with one or more men, one of them also a night watchman there, and made a search for Mr. Peperkorn. After going through the elevator they finally found his body lying between the rails on the track which runs through the chute, and under one of the cars which had been pushed in that night. One of his legs was severed from the body and carried north some distance from it. Mr. Peperkorn was dead. There was blood on the ground near the body and on the truck or fore wheels of the first car of the train as it had been pushed through the chute, blood as well as a piece of jeans, corresponding to the clothing of the deceased, were found. No one saw the accident. No one had seen the deceased on the track, nor about the premises immediately before the train was pushed through, so far as appears by the evidence. His body was lying on its back and about sixty feet from the south end of the chute. A lantern, which was identified as having belonged to the deceased, was found on the floor of the elevator, that floor being raised about four feet above the tracks and on a level with the door sills of the cars. The lantern was lighted. No lantern or parts of one appear to have been found in the vicinity of the deceased, other than this, which was sitting on the main floor of the elevator, inside of the walls. The deceased had been in the employ of the elevator company some seventeen or eighteen years, going in and out of the passageway and about the elevator building, and was thoroughly familiar with the premises. Asked if deceased knew of the passage of cars in and out there, a witness, on cross-examination by defendant, answered: "He knew—that is when they would tell him, that they were going to push in cars, yes." The witness further said that in the course of his seventeen years of employment, deceased had seen cars standing on the tracks.

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This same witness, a fellow watchman of deceased but not with him or apparently not in the vicinity at the time of the accident, testified that he did not know who had opened the doors of the elevator the night of this accident; that these doors were not allowed to stand open all the time and on the night of the accident they had been closed about eight o'clock, but he did not know who had opened them that night. In fact there is no evidence in the case as to who opened the south door; all the evidence as to this south door being that of the foreman, who, as noted, testified that when he reached there with the train, he found that door open.

This is a fairly full synopsis of the evidence in the case, so far as now pertinent. It was all introduced by plaintiff. At the close of it, plaintiff rested. Thereupon defendant offered an instruction in the nature of a demurrer; that being refused, defendant, standing on its demurrer, introduced no evidence.

The principal instruction in the case and the only one of which any complaint is now made, told the jury, substantially, that if they found that at the date of the accident, Peperkorn was engaged in the performance of his duties as a watchman on the premises of the Mississippi Valley Elevator & Grain Company, and in the chute or passageway, and if they further believed and found from the evidence that defendant, through its servants and agents at the time and place stated, "carelessly and negligently backed its aforesaid train of freight cars over the aforesaid track and into the aforesaid passageway, without having a man stationed on top of the cars or on or about the car at the end of the train farthest from the engine at the time the said train was being backed in as aforesaid, to give danger signals, and without having the said train well manned with experienced brakemen at their posts so stationed as to see danger signals and hear signals from the engine, and that the defendant company . . .

while operating the aforesaid locomotive and train of cars as aforesaid, . . . gave no notice or warning to plaintiff's deceased husband of the approach of the said train of cars when it knew, or by the exercise of reasonable care would have known, the dangerous position of plaintiff's deceased husband, but carelessly and negligently ran the said train and cars in the manner aforesaid upon and over plaintiff's said husband, thereby causing his death, and that plaintiff's deceased husband was at said time exercising reasonable care for his own safety, then your verdict will be for the plaintiff."

The court further instructed the jury at the instance of plaintiff as to reasonable care and instructed them that if they found for plaintiff their verdict should be for not less than \$2000 or more than \$10,000.

At the instance of defendant the court gave an instruction, numbered 4, that if the deceased failed to exercise such care as an ordinarily careful and prudent man would have exercised under like or similar circumstances and such failure caused or contributed to cause his injuries, if any, their verdict should be for defendant.

Another instruction told the jury that if they believed from the evidence that Peperkorn knew "or by the exercise of ordinary care would have known, that the cars in question were about to be shoved in said loading chute," etc., plaintiff could not recover.

A further instruction, given at the instance of defendant, was to the effect that if the jury found that the foreman in charge of the crew sent his rear man through the loading shed for the purpose of complying with the city ordinance, "and that said act in sending said man ahead was a substantial compliance with the ordinance, then your verdict must be for defendant.

Defendant's seventh instruction told the jury that the failure of defendant to comply with that ordinance,

if they found that it did fail, did not relieve the deceased of exercising ordinary care to look and listen for the approach of the cars in question.

Defendant's eighth instruction told the jury that the proceedings in the case are penal in nature and that their verdict would be a fine or penalty assessed against the defendant, "if you find from the evidence it is guilty of the negligence charged, and in this connection the court instructs you that you are in nowise to consider the question as to whether or not the plaintiff in this case has suffered any damage by reason of the death of her husband."

Defendant's ninth instruction told the jury that if they found from the evidence that the deceased while on the tracks in question, failed to look and listen for the approach of the cars in question and thereby caused or contributed to cause his injuries, their verdict should be for defendant.

The tenth instruction told the jury that if they found from the evidence that the deceased got on the tracks in question immediately in front of the cars and thereby caused or contributed to cause his injuries, their verdict must be for defendant.

These instructions, numbered seven, eight, nine and ten, were given exactly as asked by defendant. In other instructions asked by defendant the court substituted the word "would" in place of the word "could" and in another, calling attention to the knowledge of the danger by deceased, inserted the words, "or would have known with (while?) exercising ordinary care."

Of its own motion the court gave instructions defining ordinary care, telling the jury that the burden of proof was on plaintiff to establish by the preponderance of the evidence the facts necessary to a verdict in her favor under the instructions given except upon the issue concerning the exercise of reasonable, ordi-

nary care by the deceased. As to that issue, the jury being told that the burthen of proof was on defendant to show the want of such ordinary care or reasonable care on the part of plaintiff's husband. The court also defined the terms, "burden of proof" and "preponderance of evidence."

Defendant asked five instructions, all of which were refused. The only one, on the refusal of which error is now assigned, is this: "The court instructs you that you are not to decide this case upon speculation, conjecture or guess, and in this connection it instructs you that if you are unable to determine as to what was the cause of the death of John Peperkorn, if he be dead, except by conjecture, speculation or guess, then your verdict must be for defendant."

The errors here assigned are to the overruling of the demurrer to the evidence, it being contended, first, that that demurrer should have been sustained, because defendant's negligence as charged, that is, a failure to warn, was not the proximate cause of deceased's injuries, it conclusively appearing that the deceased knew of the presence and approach of the cars which it is alleged struck and killed him. It is further claimed under this assignment that plaintiff's cause of action is based upon what is commonly known as the "last chance doctrine" and an ordinance of the city of St. Louis. Repeating the particulars in which it was alleged the ordinance was disregarded or violated, counsel for appellant state that plaintiff abandoned the last chance doctrine and that the alleged violation of the ordinance was not supported by the evidence.

The second assignment of error to the overruling of the demurrer is that there is no causal connection established by the evidence between the deceased's death and defendant's alleged breach of the ordinance.

The third point of error, also pointing to the overruling of the demurrer, is the claim that the evi-

dence showed that the defendant had fully complied with the intent and purposes of the ordinance to the extent that the circumstances and conditions permitted.

The fourth assignment is the claim that the ordinance in question does not apply to the situation as disclosed by the record.

The fifth error assigned is to allowing the question, which we have before noted, as to whether there was any light on the first car backed in, to be asked.

The sixth point covers objections to the first instruction given at the instance of plaintiff. We have italicized the particular sentences of that instruction to which objection is made.

The final assignment is to the refusal of the court to give the instruction which we have quoted, to the effect that the case is not to be determined upon speculation, etc.

REYNOLDS, P. J. (after stating the facts).—This class of cases has been so frequently before our appellate courts that it would seem that the principles governing them and which should control in their determination have been so thoroughly discussed that an elaborate examination of the authorities is no longer necessary. Speaking broadly of the testimony in the case, it may be said of it that it was not subject to demurrer. It was sufficient to require a submission of the cause to the jury, and to sustain the verdict.

As observed by the learned counsel for appellant, counsel for respondent, while bringing the action in part on that, do not base their right to recover upon the last chance rule. They are right in this, for, from the evidence, neither that nor the humanitarian rule have a place in this case. Neither the crew of this train, nor, for that matter, anyone else, saw the deceased on the track at the time, nor saw the accident.

Counsel for appellant argue that the case is to be

determined on the construction and interpretation of city ordinance No. 22902. We have set out the substance of that ordinance, so far as here material.

This ordinance, it will be noted, provides that if any "cars or locomotives propelled by steam power be backing within said limits of the city, a man shall be stationed on top of the car at the end of the train farthest from the engine to give danger signals." That no such man was there in place is conceded. The argument of the learned counsel for appellant, however, on this point, is that the evidence shows that it was impracticable to have a man stand on the top of this car; that the space between the top of the car and the obstructions in the chute were so small that no man could stand there, and it is asserted that the evidence shows that a man could not go through the chute on top of the car unless he was lying flat on the top. We do not agree that this is borne out by the evidence. It is true that one witness testified that he laid down when he went through on one occasion; but this same witness said that one could not go through "without stooping." The inference that the jury had a right to draw from that was, that if he stooped he could go through in safety. The dimensions given, however, thirty-five inches between the running board on top of the car, which as we all know is the highest part of the car, and the arch or beam of the door, was thirty-five inches, and when the beam of the door was passed, and the car was inside of the door, the height was from forty-four to fifty-three and fifty-six inches. There is nothing whatever in this space or height to prevent any ordinary man, a man of any ordinary height and size, from sitting down and going through in safety, even if it was necessary to duck his head or stoop, immediately when passing under the beam. There was nothing to prevent him from sitting upright after that point was passed. All the argument and the cases cited by learned counsel for appellant,

to the effect that it was impracticable or unsafe to place a man in the position required by the ordinance upon the rear end of the front car, as for instance *Baltimore & Ohio R. Co. v. Mali*, 5 Atl. Rep. 87, l. c. 90, and *Rafferty v. Missouri Pacific Ry. Co.*, 91 Mo. 33, 3 S. W. 393, are entirely inapplicable. It has further been said of this provision of the ordinance requiring a man to be on the rear end of the car which is being moved in front so that he can give danger signals, that it is not meant to construe it so closely and narrowly as to squeeze the life out of this humane regulation; that, broadly construed, the ordinance "contemplates that brakemen should be so located on a moving freight train in St. Louis that they can not only see and hear danger signals, but can give them to those whose duty it is to see and obey them." [Harper v. St. Louis Merchants Bridge Terminal Co., 187 Mo. 575, l. c. 587, 86 S. W. 99.]

Looking at the duty of this defendant in the instant case, suppose a man could not with safety stand or sit or even lie flat on the top of the car, there was not only nothing to prevent, but everything, under the circumstances, to require sending one ahead along the track, or even along the floor of the elevator. The cars were being pushed slowly through this chute at midnight; the chute so dark that the foreman did and could not distinguish persons even going through with a light; was not sure that he saw one or two people walking or just where they were. It was such a place as would naturally invite persons to walk there. Ordinary care, irrespective of the ordinance, as well as the spirit of that ordinance, demanded care and a look-out in backing a train through such a place.

Mindful of the danger to the wayfarer of moving a train propelled by steam power through any part of so densely populated a city as is St. Louis, this ordinance further provides that "no freight train shall at any time be moved within the city limits unless it

be well manned with experienced brakemen at their posts, who shall be so stationed as to see the danger signals and hear the signals from the engine." In the case at bar this train, so far as the evidence shows, was not manned at all. There is not a scintilla of evidence in the case to show that there was a brakeman, whether experienced or inexperienced, except the "hind man," who was at least a hundred and eighty-five feet away from the south end of the chute when the train started through. The foreman was over a hundred and twenty-five feet off and out of sight of the chute. The engineer was the length of the cars, the tender and engine further away. No living human being is testified to have been anywhere in charge of or in communication with this train except the foreman, the engineer and the "hind man." No one preceded this train as it was slowly backed or pushed through this blind passageway. There was no warning to notify anyone who might be on the track of the approaching train. The duty to have this train well manned, not only with a brakeman on the rear end of the forward car but, referring to this "well manning" clause of the ordinance, is clearly announced by our Supreme Court in *Harper v. Terminal Company*, *supra*:

Moreover, at the instance of appellant the court submitted to the jury, as a question of fact for their determination, if they found that the foreman, in sending his "hind man" through this shed or chute, did so for the purpose of complying with the city ordinance, to determine whether that was a substantial compliance with the city ordinance, and if they did find that it was, their verdict should be for defendant. We do not hold that this instruction should or should not have been given. All we do say of it is that having been given at its own instance, defendant has no ground of complaint and is concluded as to that by the verdict of the jury, the jury undoubtedly find-

ing that this act was not a substantial compliance with that provision of the ordinance.

Learned counsel for appellant argue, first, that there is no causal connection shown between the absence of all these precautions, which the ordinance of the city requires, the neglect to conform to the ordinance, and the death of this old man; second, those counsel suggest that he may have died of heart failure, or that he may have seen and did not heed the approaching train.

As to the first, we hold that there was ample evidence to prove that the cause of death was the failure to observe the ordinance.

There is nothing in the evidence to support the second suggestion; no evidence that the deceased had ever had any trouble with his heart. That this old man was on the track when this train was being pushed through, is shown by the fact that his body was found under a car, on that track, between the rails; one leg severed from the body and carried a distance of some sixty feet from the place where the body rested and in the direction in which the train had been moved; blood was found around there; blood and shreds of clothing were found upon the forward trucks or wheels of the forward car which had been pushed through the chute. What stronger evidence could possibly be offered of the fact that this old man came to his death by having been struck and run over by this particular train? The evidence is that no other train had passed through there that night. That his death was caused by being run over by this particular train is beyond doubt. The law presumes in a case of that kind, that one had not committed suicide, and if there is any ground for presumption, it is directly against that of carelessness. Carelessness is usually contributory negligence and it is for the defendant to allege and the burden is on it to prove contributory negligence.

There was no ground for any speculation, conject-

ture or guesswork in this case; no reason to suppose that the death occurred in any other way other than by means of this train. Hence the instruction, cautioning the jury against indulging in speculation, conjecture and guesswork, asked by appellant, was properly refused. That instruction as asked, instead of cutting off conjecture, would have thrown the door wide open for it. By its concluding sentence it would have set the jury to guessing and conjecturing for a cause, instead of confining them to the only known cause disclosed by the evidence. The old and leading case of *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 219, settles this proposition beyond controversy. There it is held that presumptions are not to be allowed in the face of known facts. The very able and exhaustive opinion in that case has been followed in every case since considered by our appellate courts in which that proposition has arisen. Counsel cites in support of that instruction, a late decision of the Kansas City Court of Appeals, *Rogers v. Hammond Packing Co.*, 167 Mo. App. 49, 150 S. W. 558, point 3. An examination of that case and of the opinion shows very conclusively that it has no application whatever to the facts in the case at bar. Judge JOHNSON there quoted from *Goransson v. Manufacturing Co.*, 186 Mo. 300, l. c. 307, 85 S. W. 338, to the effect that it is a rule of universal law that in suits of the character before the court, it is necessary for the plaintiff to allege and prove a causal connection between the injury and the negligence of the master. "The corollary of this rule," says the court, "is that if the accident might have resulted from more than one cause, for one of which the master is liable and for the other he is not liable, it is necessary for the plaintiff to prove, in the first instance, that the injury arose from the cause for which the master is liable; for it is not the province of a court or jury to speculate or guess from which cause the accident happened." No one will dispute that rule,

Peperkorn v. Transfer Co.

but it is not applicable to the facts in the case at bar. As we have before said, there was no room for speculation or conjecture or guesswork. There were no two causes here. In the presence of the known, visible facts, no room was left to court or jury to go hunting around for something else that might have been the cause of the accident.

Finally it is claimed, as to this ordinance, that it does not cover the place of this accident. That proposition is settled against this claim by the decision of our Supreme Court in Grube v. Missouri Pacific Ry. Co., 98 Mo. 330, l. c. 337, 11 S. W. 736, where Rafferty v. Missouri Pacific Ry. Co., 91 Mo. 33, 3 S. W. 393, relied on by appellant, is explained. [See, also, Merz v. Missouri Pacific Ry. Co., 88 Mo. 672; Prewitt v. Missouri, K. & T. Ry. Co., 134 Mo. 615, l. c. 626, 36 S. W. 667; and Jackson v. Kansas City, Ft. S. & M. R. Co., 157 Mo. 621, l. c. 633, 58 S. W. 32.] These are all cited by counsel for respondent in their brief. As counsel for appellant, in their reply brief, make no comment on this, we may assume that those learned gentlemen have abandoned the point. Whether they have or not, we hold against them on it.

We see no error in the clauses in the first instruction given at the instance of plaintiff which were pointed out by the learned counsel for appellant, and which we have italicized. They are, taken in connection with the body of the instruction, entirely correct.

Considering the instructions given on behalf of plaintiff and of the defendant, surely defendant has no cause whatever to complain. The court went to the very farthest limit under the law in giving defendant the benefit of every possible theory upon which, within the issues and the evidence, it could be asked by defendant.

The only assignment of error in the admission of the testimony is to overruling the objection to the question as to whether there was a light on the front of

the car as it went through this chute. That objection was made after the question had been asked and the answer given. That was too late. Counsel for appellant say that we should take notice of the fact that witnesses frequently answer so quickly that an objection cannot be interposed. We may know that happens, but we cannot assume that it occurred here. We must be governed by the record in the case and no such state of facts appear here.

A consideration of the case and of the authorities presented by the learned counsel for appellant leaves us no latitude whatever, gives us no ground whatever, upon which to sustain a reversal of this judgment. The trial was without any error materially affecting or prejudicing the rights of defendant, the verdict is not claimed to be excessive and, as we think, was for the right party.

The judgment of the circuit court is affirmed.
Norton and *Allen, JJ.*, concur.

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BY JOHN M. CLEARY.

ABSTRACTS. See **Practice, Appellate.**

Counter Abstract: Transcript. On an appeal by the short form, if the appellant's abstract of the record, in the opinion of the respondent, is not substantially full and complete and fails to properly state the evidence, the latter may file an additional abstract, which, if not controverted by appellant, will be accepted as true. But if objected to by appellant in writing, the court will order the circuit clerk to send up the transcript, from which it will ascertain which is correct. The respondent will not be permitted to omit that course and file in the appellate court the transcript of the trial and refer the court to it to ascertain the evidence. In such case the abstract as presented by the appellant will be accepted as correct. *Grant v. Grant*, 317.

ACTIONS.

Ex Delicto and Ex Contractu: Distinction. While the forms of civil actions have been abolished in this State, the distinction between actions for tort and for breach of contract are observed. *Howell v. Railway*, 92.

ADMINISTRATORS.

1. **Property Not of Estate:** Administrator Taking Possession of: Owner May Replevin. Where an administrator takes possession of property not belonging to an estate and holds the same as being property belonging to such estate, a suit in replevin will lie by the owner of such property against the administrator in his official capacity. *Silsby v. Wickersham*, 128.
2. **Possession of and Sale by Administrator:** Relief in Equity. Where an administrator takes possession of property not belonging to an estate and sells the same as part of the estate and receives and uses the proceeds as part of said estate, a court of equity will afford relief to the owner by decreeing that payment be made for such property out of the funds of the estate. Ib.
3. **Administrator Taking Possession of and Selling:** No Remedy Where Ownership and Possession Had Been Parted With. But where one parts with both the ownership and the possession of goods in either of the above mentioned events, he cannot thereafter maintain replevin for goods thus in possession of the administrator, nor will equity afford him relief, the administrator having sold the goods as part of the estate. Ib.
4. **Exceeding Authority:** Estate Not Bound. A wife, as administratrix of the estate of her deceased husband, had no authority to bind the estate by purchasing and agreeing to pay for goods to be used in the continuation of the business which had been conducted by her husband before his death. Ib.

APPEAL AND ERROR. See Divorce.

1. **Position Assumed in Trial Court: Not to be Changed in Appellate Court.** The plaintiff is bound by the position taken by him in the trial court, and having tried his case on the theory that the issue of contributory negligence was raised by the pleadings, he will not, on appeal, be heard to complain because instructions on that issue were given by the trial court. *Wallower v. Webb City*, 214.
2. **Refusal of Instructions: Conflicting Testimony: Finding of Trial Court Sustained.** Where the instructions refused by the trial court declared or assumed facts concerning which there was conflicting testimony, the appellate court will not disturb the ruling of the trial court, as the finding of the trial court on conflicting evidence is conclusive on the appellate court. *Crow v. Abernathy*, 227.
3. **From Justice Courts: Filing Notice of.** While Sec. 7582, R. S. 1909, relating to appeals from justice of the peace courts, does not require that the notice of appeal and proof of service thereof be filed with the trial court, yet the usual and proper practice is to do this so as to avoid controversies relative thereto. *Comstock v. Packing Co.*, 410.
4. **Notice Insufficient: Issues.** When a notice to affirm a judgment for failure to give proper and timely notice of the appeal has been filed, an issue of fact is raised and the court may hear evidence thereon. *Ib.*
5. **Sufficiency of Notice: Jurisdiction.** Section 7584, R. S. 1909, provides for the giving of proper and timely notice of an appeal from the justice court, where the appeal is not allowed on the same day the judgment is rendered by the justice. Held, that this is a matter going to the jurisdiction of the circuit court to hear and determine the case or to do anything other than affirm the judgment or dismiss the appeal at the option of the appellee. *Ib.*
6. **Necessity of Notice: Actual Knowledge Does Not Relieve From.** Actual knowledge that the appeal has been taken and the case lodged in circuit court and that the same has been docketed and is for trial, does not dispense with the giving and service of a proper and timely notice of appeal. *Ib.*
7. **Notice: Form and Manner of Service: Statutory Requirements.** When a statute prescribes a particular form and manner for the service of a notice, no other form or manner is effectual for any purpose of the notice, without an acceptance or waiver by the party entitled to receive it. *Ib.*
8. **Notice: Service: Requirements of Statutes: Review of.** Sec. 7582, R. S. 1909, providing for a notice of appeal from justices of the peace courts and the manner of serving same, is examined and the essentials of proper notice and service thereof are reviewed and explained. *Ib.*
9. **No Notice Shown: Circuit Court's Duty.** On an appeal from a justice of the peace court to the circuit court, where the appellee has not waived the question of jurisdiction over his person by appearing in the circuit court to the cause generally, the circuit court must affirm the judgment of the justice of the peace or dismiss the appeal, in the absence of an affirmative showing that a proper and timely notice of appeal has been served, and this even though the appellee files no motion to that effect. *Ib.*

APPEAL AND ERROR—Continued.

- 10. Notice: Service on Agent or Attorney: Construction of Provision.** The statutory provision, "if the appellee shall have appeared to the suit before the justice of the peace either by agent or attorney, said notice may be served on said agent or attorney," does not mean that the attorney for the appellee should actually be present in the justice court at the time the judgment is rendered; it is sufficient if the facts show that the attorney, though not actually present, was in fact representing the appellee in the justice court. Ib.
- 11. Notice: Sufficiency Questioned: Burden of Proof.** Where the sufficiency of the notice of an appeal from justice court is challenged in circuit court, it is incumbent on the one whose duty it was to serve such notice to prove that timely notice in proper form was served and that it contained the requirements made essential by statute. Ib.
- 12. Appealable Orders: Setting Aside Default Judgment.** Although section 2038, Revised Statutes 1909, authorizes an appeal from any special order after final judgment, it does not, according to the construction given it by the Supreme Court in *Crossland v. Admiré*, 118 Mo. 87, authorize an appeal from an order setting aside a final judgment by default. *Bussiere v. Sayman*, 11.
- 13. Construction of Supreme Court's Decision.** A dismissal by the Supreme Court of an appeal from an order vacating a final default judgment, on the ground that the order is not one granting a new trial within section 2038, Revised Statutes 1909, authorizing an appeal from an order granting a new trial or from any special order after final judgment, is a decision that the order is not appealable under any provision of the statute, and the judgment of the Supreme Court concludes the question of the appealability of such an order. Ib.
- 14. Right to Appeal.** Although the right of appeal is purely statutory, it is nevertheless available to every person who prosecutes one within the terms of the statute authorizing it. Ib.

ATTORNEY'S LIEN.

ATTORNEY'S LIEN: Client's Right to Compromise: Settlement Liquidates Amount of Attorney's Fees. A client can compromise his case and settle it with or without the consent of his lawyers. And the amount of the fee will be liquidated by such settlement. *Belch v. Schott*, 357.

AUTOMOBILES.

- 1. Injury to Pedestrian: Negligence.** Evidence that an automobile whirled into a driveway at a "lively" rate of speed and forcibly struck a pedestrian before he could get out of the way, dragging him fifteen or twenty feet, was sufficient to establish negligence on the part of the chauffeur. *Hodges v. Chambers*, 563.
- 2. Negligence: Contributory Negligence.** In an action for injuries resulting from a collision of defendant's automobile with plaintiff on a public driveway, held, that the questions of negligence and contributory negligence were for the jury. Ib.
- 3. Contributory Negligence: Choosing Unsafe Passageway.** A person who was struck by an automobile while he was walking on a public driveway, which, though primarily designed for vehicles,

AUTOMOBILES—Continued.

pedestrians had a right to use and did frequently use, is not to be denied a recovery on the theory he knowingly chose a dangerous passageway when a safe one was at hand, where the driveway was not dangerous except when drivers were negligent. Ib.

4. **Negligent Operation: Construction of Statute.** A driveway which is a public highway need not be "much" used to be within Sec. 8523, R. S. 1909, giving redress to one injured by the negligent operation of an automobile on "public highways . . . or places much used for travel, etc." Ib.
5. **Sec. 8523, R. S. 1909,** giving redress to one injured by the negligent operation of an automobile, being in derogation of the common law, must be strictly construed, and yet it must be so construed to effectuate the obvious intent and purpose of the lawmakers. Ib.
6. **Negligent Operation: Degree of Care Required.** The degree of care required by Sec. 8523, R. S. 1909, of one operating an automobile on a public highway to prevent injury to persons thereon, is the highest degree of care that a very careful person would use under the same or similar circumstances. Ib.
7. **Injury to Pedestrian: Contributory Negligence: Instructions.** In an action for personal injuries resulting from plaintiff being struck by an automobile, while walking on a driveway which was thirty feet or more wide, defendant requested the court to charge the jury that if they found from the evidence that plaintiff saw the automobile approaching and afterwards had time to avert the collision by using ordinary care in turning out and getting off of the driveway and failed to do so, he was guilty of contributory negligence. Held, that the instruction was properly refused, since it cannot be said that it is the duty of one walking on a driveway, thirty feet or more wide, to get off of it on seeing an automobile turn into it. Ib.

BANKRUPTCY.

Equities of Third Persons: Estoppel. Under Sec. 70a of the Bankruptcy Act, providing that the trustee is vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, the trustee takes title, not as an innocent purchaser, but subject to all valid claims, liens and equities, and, where the bankrupt by his conduct would have been estopped to assert a claim, such estoppel may be invoked against the trustee, in like manner as it might have been invoked against the bankrupt. Palmer v. Welch, 580.

BILLIARD AND POOL TABLES. See **Crimes and Punishments.**

BILLS AND NOTES.

PROMISSORY NOTE: Liability on a Condition Only: Cannot Establish by Parol Evidence. Parol evidence is not admissible to show that the maker of a note, which purports to be payable absolutely, only promised to pay on condition. Bank v. Martin, 194.

CANCELLATION OF INSTRUMENTS.

1. **Innocent Holder: Fraud and Deceit.** Promissory notes secured by a deed of trust were placed in the hands of a real estate agent, to be negotiated by him and the proceeds to be used in improving

CANCELLATION OF INSTRUMENTS—Continued.

the mortgaged property. The agent pledged the notes and deed of trust to secure his own indebtedness, and the pledgee sold the collateral for nonpayment of the debt secured. In an action against the vendee at that sale, to cancel the notes and deed of trust on the ground they were obtained through fraud, held that neither the pledgee nor the vendee was an innocent holder or purchaser of the notes and deed of trust, and hence it is held that a decree cancelling them was proper. *Veney v. Furth*, 678.

2. **Tender: Pleading.** In a suit in equity to cancel a note and deed of trust securing it, on the ground they were obtained through fraud, held that neither a tender before suit nor in the petition, of whatever may have been due from plaintiff, was necessary, since, first, plaintiff did not admit owing anything; second, even on defendant's theory that something was due, the amount was a matter of conjecture and dispute; and, third, the suit being in equity, an averment that plaintiff would comply with all orders and decrees of the court and would pay such amounts as the court might order, was sufficient. *Ib.*

CARRIERS OF LIVE STOCK. See **Common Carriers.****CARRIERS OF PASSENGERS.**

1. **Sleeping Car Companies: Duty Regarding Passenger's Effects.** A sleeping car company does not accept the effects of its passengers as a bailee, nor does it undertake to maintain a place where accommodation is furnished for the safety of its patrons' property, like an innkeeper, and hence it does not assume the exceptional liability of an insurer, which the law imposes upon common carriers of goods or innkeepers because of their public calling—its duty being merely to exercise reasonable care to maintain a vigilant watch by competent persons for the safety of passenger's effects left in its car. *Dings v. Pullman Co.*, 643.
2. **Mere loss of luggage taken by a passenger into a sleeping car** does not make out a *prima facie* case of liability against the sleeping car company. *Ib.*
3. **Sleeping Car Companies: Duty Regarding Passenger's Effects: Question for Jury.** While a train was standing in front of a depot in a town, plaintiff's effects were lost from a sleeping car, on which he was a passenger. The train stood there about twenty or thirty minutes, and during all of that time the rear door of the car was locked, the windows were closed and a watchman was stationed at the forward door. Held, that reasonable men might differ as to whether the sleeping car company was negligent with respect to the manner in which it kept watch for the safety of plaintiff's effects, and hence the question was one for the trier of the facts. *Ib.*

COMMON CARRIERS.

1. **Breach of Contract of Carriage: Damages: Facts Stated.** A shipper was promised by defendant railroad company a certain kind of a car in which to load and ship mules to market, and, upon being advised by defendant's station agent that the car would be at the station at the appointed time, drove the mules there, but found, on arrival, that the character of car stipulated for was not there and that the car tendered was unsafe. He refused to ship in this car, and, refusing also to wait for another car which would be brought in on another train, drove the mules

COMMON CARRIERS—Continued.

back to the farm where he had been keeping them, several miles distant, and from there drove them to another station on another railroad, from which point they were shipped, arriving, however, too late for the market for which he intended them and in a gaunt and stiff condition. In an action for damages for breach of the contract to furnish the kind of car stipulated for, all of the elements of damages counted on were eliminated from the case by instructions, except the claim arising from the driving of the mules from defendant's station to the farm and from there to the other station. Held, under these facts, that damages for driving the mules from defendant's station to the farm and for depreciation in value caused by that drive were the only damages plaintiff was entitled to recover; held, further, that plaintiff was not entitled to recover for shrinkage in value of the mules by reason of driving them from the farm to the station on the other railroad, since this matter and its effect were things not within the reasonable contemplation of the parties to the contract. Howell v. Railroad, 92.

2. **Breach of Contract of Carriage: Damages.** Three things might reasonably be anticipated as the result of the breach of a contract by a carrier to furnish a shipper with a certain kind of a car, namely: delay in reaching the market; expense incident to the delay; and loss of the market for which the shipment was intended. Ib.

CONTRACTS. See Guaranty.

1. **Wilful Abandonment: Quantum Meruit: Measure of Recovery.** Where one party to a contract wilfully abandons it, or prevents the other party from fully performing, such other party may also abandon it and sue in *quantum meruit*, and recover the reasonable value of his service; and in such case he is not confined to the compensation stated in the contract. Car Co. v. Kast, 309.
2. **Automobile: Sale: Contract: Compensation.** A person owning an automobile desired to sell it and purchase a new one. He agreed with a dealer in such machines that if the latter would sell his old one, the dealer could sell him a new one. The dealer sold the old one, whereupon the man refused to permit the dealer to sell him a new one—refused to purchase. The dealer thereupon brought his action in *quantum meruit* for the value of his services in selling the old machine. It was held that his action was well brought and that the value of his services was not to be confined to the compensation named in the contract—that is, the profit in a sale of a new machine. Ib.
3. **Ambiguous Terms: Construction of.** When a contract is fairly open to two interpretations, one favorable to the party who wrote it, and the other to the opposite contracting party, then that construction will be adopted which is most favorable to the latter. Ambiguous terms in a contract are always to be construed against the party using such terms. Belch v. Schott, 357.
4. **Sales: Upon Approval.** Where a piano was delivered on the express understanding and agreement that it would turn out to be satisfactory to the purchaser and the latter notified the seller within a reasonable time after its delivery that it was not satisfactory, there was no sale. Music Co. v. Grannis, 392.
5. **Status Quo.** And where the contract of sale imposed no obligation on the purchaser to return the piano, it was the duty of the seller to restore the *status quo* existing at the time the contract was made. Ib.

CONTRACTS—Continued.

6. **Fraudulent Representations:** Suits at Law: In Equity. There is a distinction between suits at law for damages and suits in equity for the rescission of the contract. The measures of damage are different and the method of trial and the relief granted differ. *Peters v. Lohman*, 465.
7. **Construction.** The intention of the parties to a contract is to be gathered from a consideration of all its provisions. *Duncan v. Turner*, 661.

CONTRIBUTORY NEGLIGENCE. See **Automobiles, Electricity, Master and Servant, Street Railways.**

1. **An Affirmative Defense: Must be Pleaded: Exception to the Rule.** Contributory negligence is an affirmative defense and as a general rule must be alleged in order to be available. Yet, in cases where the plaintiff's own evidence tends to show that he was guilty of contributory negligence which defeats his right of recovery, the defendant may take advantage thereof, although the answer contains no plea of contributory negligence. *Wallower v. Webb City*, 214.
2. **Question for Jury Under Proper Instructions.** In an action against the master by the servant for personal injuries occasioned by the alleged negligence of the master in not safeguarding certain machinery, where the question of contributory negligence on the part of the servant was properly submitted to the jury under sufficient instructions, the finding of the jury under the evidence relative thereto is binding on the appellate court. *Brashears v. Iron Works Co.*, 507.

COURT STENOGRAPHERS.

1. **Nature of Office: Officers.** A court stenographer, under the provisions of Secs. 11232, 11233, R. S. 1909, is an officer of the court. *State ex rel. v. Hitchcock*, 109.
2. **Furnishing Free Transcripts to Poor Persons: Costs: Statutory Construction.** Sec. 2261, R. S. 1909, provides that the court may permit a party to prosecute an action as a poor person, in which case he shall have all necessary process without fees, tax or charge, and the court may assign counsel, who, as well as all other officers of the court, shall perform their duties without fee or award. Section 11233, which was enacted after section 2261 was enacted, provides that court stenographers shall receive for their services, in addition to a salary, certain fees from any person ordering a transcript of their notes. Sec. 11263, R. S. 1909 provides that a transcript of the evidence shall be furnished to the defendant in a criminal case, without cost to him, when the court is satisfied that he is unable to pay for the same, in which case the stenographer's fees shall be taxed as costs against the State or county. Held, that the provision for furnishing a transcript in criminal cases *gratis* is not a legislative construction of section 2261, so as to exempt stenographers from furnishing transcripts in civil cases to parties who are unable to pay for the same, on the principle "*expressio unius exclusio alterius est;*" held, further, that the provision in section 2261, requiring officers to perform their duties without fee or award for any party allowed to prosecute an action as a poor person, was not repealed by implication by section 11233, which provides for the payment of fees to stenographers, but both statutes should be considered together. *Ib.*

COURT STENOGRAPHERS—Continued.

3. **Furnishing Free Transcripts to Poor Persons: Duty of Judge.** Sec. 2261, R. S. 1909, requiring officers of the court to perform their duties without fee or award for any party allowed to prosecute an action as a poor person, is applicable to court stenographers, as well as other officers of the court; and hence it is the duty of the judge, after having granted a party permission to sue as a poor person, to order the stenographer to furnish such party a transcript of the proceedings at the trial, without the payment of the fees chargeable therefor. Ib.
4. **Form of Order: Costs and Fees.** Where the trial court orders the stenographer to furnish a person allowed to sue as a poor person a transcript of the proceedings at the trial, without the payment of the fees chargeable therefor, the legal fees for doing such work are to be taxed in his favor and are recoverable in the event judgment be entered for plaintiff, as provided by Sec. 2261, R. S. 1909; and the order on the stenographer should so provide. Ib.

COURTS.

1. **Jurisdiction: Establishing County Road: Injunction Against: Supreme Court's Appellate Jurisdiction.** An action to enjoin the opening of a roadway, where the validity of the proceedings establishing the same is questioned, is within the appellate jurisdiction of the Supreme Court and not of the Court of Appeals, since the title to real estate is involved. Summers v. Cordell, 184.
2. **Appellate Jurisdiction: In Supreme Court When Title to Real Estate is Involved.** An action to redeem certain land from a sale under a deed of trust, is within the appellate jurisdiction of the Supreme Court and not of the Court of Appeals, since the title to real estate is involved within the meaning of Sec. 12, Art. 6, of the Constitution. House v. Clark, 242.

COURTS OF APPEAL. See Jurisdiction.

Jurisdiction: Determined by Examination of Entire Record. In order to determine its jurisdiction of an appeal, an appellate court will examine not only the pleadings and judgment but the entire record, and if there is any doubt as to its jurisdiction in the matter, will transfer the case to the Supreme Court. Bingaman v. Hannah, 186.

COVENANTS.

How Created. No particular form of words is necessary to create an express covenant, but any words importing an agreement are sufficient. Truchon v. Mackey, 42.

CONVEYANCES.

After-Acquired Title: Estoppel. Where one conveys land which he does not own at the time, by a deed containing the usual covenant importing an indefeasible seisin, any title subsequently acquired by him inures to the grantee. Patton v. Forgey, 1.

CORPORATIONS.

Consolidated Corporation: Liability for Debts of Constituent Members. As a general rule, where two or more private corporations are consolidated into a new corporation and the constituent

CORPORATIONS—Continued.

corporations go out of existence, the consolidated corporation may be required to respond for their outstanding liabilities, if no arrangements are made respecting their property and liabilities. *Winkleman v. Levee District*, 49.

CRIMES AND PUNISHMENTS.

1. **Billiard and Pool Tables:** *Kelly Pool.* If a pool table is used for gambling purposes, it is a gaming table within the meaning of the statute (Secs. 4752 and 4753, R. S. 1909), whether the game played upon it be Kelly pool, poker or craps. *State v. Leaver*, 371.
2. **Owners of Pool Hall: Permitting Gambling.** It is immaterial that the defendants did not gamble themselves. If they allowed the pool tables to be used by their customers in playing games of chance for money or property, they violated the statute (Sec. 4753, R. S. 1909). *Ib.*
3. **Information: Language of Statute.** An information is good if it charges an offense in the language of the statute. *Ib.*
4. **Misconduct of Prosecuting Attorney: Failure to Rebuke.** When counsel go outside of the record in their arguments to juries and indulge in assertions of facts that are not relevant to the issues and which are calculated to cause the jury to disregard the real merits of the case, the failure of the trial court to give proper heed to objections of opposing counsel, will constitute reversible error. *Ib.*
5. **False Pretenses: Requisites of Offense: Promises Concerning Future Events.** To constitute the crime of obtaining money or property by false pretenses, it is requisite that the false pretenses should be either concerning a past event or concerning some fact having a present existence. *State v. Krouse*, 424.

CRIMINAL LAW.

1. **Wife Abandonment: Elements of Crime.** To constitute one guilty of the offense of wife abandonment the evidence must show that the abandonment was without good cause and the criminal intent to abandon and to fail to support the wife must clearly appear. *State v. Burton*, 345.
2. **Evidence.** Where the evidence showed no unpleasant feeling between husband and wife and no intent on the part of the former to abandon the latter, the mere fact that the husband failed to keep his promise to come after his wife, who was on a visit to her father's home, coupled with the fact that the husband went off on a visit himself without notifying his wife where he was going, will not justify a conviction of wife abandonment where the wife was in her husband's home tenderly cared for by her husband's parents, and within a week after the husband's leaving the wife left her husband's home and replevined and took away the furniture given them by her father-in-law, and expressed a determination not to live with her husband again. In such case there is no evidence of the criminal intent to abandon and fail to support her. *Ib.*
3. **False Pretenses: Statutes Relating to: Effect of Amendatory Statute.** The provisions of Sec. 4564, R. S. 1909, and the amendment, Acts 1911, page 194, relating to the offense of false pre-

CRIMINAL LAW—Continued.

tenses, are examined under the provisions of Sec. 4920, R. S. 1909, and their intendments are construed. *Held*, in the present case that the defendants were properly charged under sec. 4565, R. S. 1909, and that the trial court properly gave defendants the benefit of Session Acts 1911, page 194, in the instructions concerning the degree of punishment. *State v. Krouse*, 424.

4. **Jurisdiction of Appeal.** In a prosecution for obtaining money under false pretenses, where the jury under proper instructions fixed the punishment at a fine of \$20, the jurisdiction of the case on appeal was with the Court of Appeals. *Ib.*

DAMAGES. See Common Carriers.

1. **Breach of Contract.** The party committing a breach of a contract is liable for such damages only as arise from such breach itself, according to the usual course of things, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. *Howell v. Railroad*, 92.
2. **Damage Act: Statutes Construed: Compensatory Damages.** Secs. 5426 and 5427, R. S. 1909, are intended to give only compensatory damages and are in no sense penal. One suing under these sections must show the pecuniary loss and the damages must be pleaded and proven in order to recover. *Johnson v. Mining Co.*, 134.
3. **Suit by Administrator: Pleadings: Necessary Allegations.** An administrator brought suit under Secs. 5426 and 5427, R. S. 1909, to recover damages for the negligent death of his intestate, who at the time of his death was over the age of 21 and left no wife or minor children, natural born or adopted, surviving him. *Held*, that in order to maintain such action under said sections, it is necessary for the administrator to allege and show for whom he brought the suit in order to show wherein they were entitled to be compensated for the necessary injury, i. e., the pecuniary loss. [ROBERTSON, P. J., dissenting.] *Ib.*
4. **Petition: Demurrer to.** In an action by an administrator to recover damages for the negligent death of his intestate under Secs. 5426 and 5427, R. S. 1909, where the petition merely alleged that the plaintiff was the duly appointed administrator, set out the facts of negligence complained of, and the death of the deceased resulting therefrom, and alleged that the estate of the deceased had sustained injury, held, that a demurrer to the petition was properly sustained by the trial court. [ROBERTSON, P. J., dissenting.] *Ib.*
5. **Assault: Loco Parentis.** Plaintiff, a minor and an orphan, sued to recover damages for an assault on her by defendant. The latter tied her feet and hands and cruelly beat and whipped her. *Held*, that the assault was wicked and criminal and, assuming that defendant stood in the relation of a parent to plaintiff, she should answer for the damages resulting from such excessive punishment. *Dix v. Martin*, 266.
6. **Personal Injuries: Instructions.** In an action for personal injuries, held that the instruction on the measure of damages was correct. *Hodges v. Chambers*, 564.
7. **Breach of Contract: General Damages: Pleading.** In a suit for damages for breach of a contract, plaintiff may recover, under

DAMAGES—Continued.

- a general allegation and without special pleading, such damages as naturally arise from the breach. *Harrison v. Coleman*, 633.
8. **Special Damages: Waiver: Trial Practice.** By not objecting to the introduction of evidence of special damages not pleaded, the defendant waives his right to complain of the action of the court in submitting it for consideration; the court being authorized by Sec. 1847, R. S. 1909, in case of an immaterial variance, to order an immediate amendment, or to direct the facts to be found according to the evidence. *Ib.*
9. **Personal Injuries: Excessive Verdict.** A verdict of \$5000 for the breaking of an ankle and a leg of a fifteen-year-old girl, who also received a number of painful flesh wounds and a general nervous shock which may tend to impair her health during her whole life, is not excessive. *Dudley v. Railroad*, 652.

DEATH BY WRONGFUL ACT.

1. **Evidence: Financial Condition of Widow.** In an action by a widow for the death of her husband, under Sec. 5425, R. S. 1909, evidence that plaintiff had no other means of support than her husband is admissible, *Kettlehake v. Foundry Co.*, 528.
2. **Measure of Damages: Instructions.** In an action by a widow for the death of her husband, under Sec. 5425, R. S. 1909, an instruction that if the jury found for plaintiff, they should award her not less than \$2000 and not more than \$10,000, as they might deem fair and just under the evidence, with reference to the necessary injury resulting to her from the death of her husband, and in determining what such injury is, they should consider all the evidence bearing upon that subject, was correct. *Ib.*

DEEDS OF TRUST. See *Mortgages and Deeds of Trust*.**DIVORCE.**

1. **Appeal: Evidence: Deference to Finding of Trial Court.** While in a divorce proceeding the appellate court reviews the entire record, both the facts and the law, yet, where the evidence is in direct conflict, great deference is paid to the finding of the trial court who had the advantage of personal contact with the parties and their witnesses and was better prepared to judge their credibility and weigh their evidence. *Held*, that the finding for the defendant was not against the preponderance of the evidence. *Long v. Long*, 202.
2. **Maintenance: Indignities.** Though the wife takes the initiative and leaves the husband's home, if she has been impelled to do so by such treatment by him as has rendered her condition intolerable and would entitle her to a divorce, she may maintain an action for support and maintenance. *Grant v. Grant*, 317.
3. **Trivial Cause: Choice of Home.** Where the causes of trouble between a husband and wife are trivial and where it appears that her leaving home is largely influenced by a desire to live in town instead of on a farm, no cause of action for separate maintenance exists. Evidence examined and considered. *Ib.*
4. **Evidence.** A letter written by the son of a husband by a former marriage, to the present wife, without the knowledge of the husband, is not proper evidence in favor of the wife's action for maintenance. *Ib.*

DRAINAGE DISTRICTS.

1. **Liability of New District Succeeding Old: Corporations.** Where a levee district ceased its activities and did not exercise its franchise rights after a judgment was rendered against it, and another levee district, covering the same territory and inhabitants and exercising the same powers with respect to the levying and collecting of taxes, took over, without compensation, all of the property of the old corporation, the latter, in an action on the judgment against the new corporation, will be treated as defunct, although in fact, it had not been formally dissolved, and the new corporation will be treated as a continuation of the old; the grant of power and franchises being to the inhabitants of the incorporated territory rather than to the dry shell of the corporation. *Winkleman v. Levee District*, 49.
2. **Character: Municipal Corporations.** Drainage districts, incorporated under article 9, chapter 41, Revised Statutes 1909, are public corporations, municipal in character, and resemble in their attributes townships and school districts. *Ib.*

ELECTRICITY.

1. **Uninsulated Wire: Action for Death: Sufficiency of Evidence.** In an action against an electric light company for the death of a lineman employed by a telephone company, caused by a shock received from a telephone wire which had fallen across a defectively insulated high tension wire maintained by the defendant, *held*, that the question of defendant's negligence was properly submitted to the jury. *Jeffrey v. Light Co.*, 29.
2. **Contributory Negligence: Instructions.** In an action against an electric light company for the death of a lineman employed by a telephone company, caused by a shock received from a telephone wire which had fallen across a defectively insulated high tension wire maintained by defendant, *held*, that an instruction which was authorized by the evidence, that if the jury believed from the evidence that the act of decedent in taking hold of the telephone wire, if the jury should find from the evidence that he did take hold of it, was an act that a reasonably prudent person of his age and knowledge would not have done under the circumstances, and that such act directly contributed to his death, the verdict should be for defendant, was a correct instruction. *Ib.*
3. **Same.** In an action for injuries to an electric lineman, from a defectively insulated electric light wire is improper to instruct the jury that the mere omission of the lineman to wear rubber gloves or boots precludes his right of recovery as a matter of law. *Ib.*
4. **Same.** In an action against an electric light company for the death of a lineman employed by a telephone company, caused by a shock received from a telephone wire which had fallen across a defectively insulated high tension wire maintained by defendant, the court instructed that it was decedent's duty to exercise reasonable care for his safety, and if, in attempting to remove the telephone wire, he omitted to take such precautions as a reasonably prudent boy of his age and experience should have taken, and, in the exercise of ordinary care, he could have known of his liability to injury from the cable and that the wearing of rubber gloves and boots would have lessened his peril, and if the jury believed that the wearing of such articles would have been a reasonable precaution for him to have taken for his own safety, and that, knowing of the peril of working without them, he took hold of the wire without taking such precaution, and thereby

ELECTRICITY—Continued.

directly contributed to his own injury, the jury should find for defendant. *Held*, that the instruction was not vulnerable to the objection that it charged that the failure to wear rubber gloves or boots would preclude a recovery as a matter of law, but, on the contrary, it properly submitted that matter to the jury for a finding. *Ib.*

EQUITY. See Interpleader.

1. **Advice of Jury.** Though a proceeding is in equity, the trial court may take the advice of a jury, not being bound thereby. *Taylor v. Perkins*, 246.
2. **Attorney's Fee: Lien: Discharge.** In a proceeding to enforce a lien for an attorney's fee, if it be shown that the attorney was rightfully discharged for failure to serve his client faithfully, he cannot enforce a lien for a fee. *Ib.*
3. **Champerty: Consideration.** If an attorney agrees to pay the costs of a case as a part of the consideration for employing him, it is champertous and void and no lien for a fee can be enforced. *Ib.*
4. **Attorney's Lien: Common Law.** The statute of Missouri giving an attorney a lien for a contingent fee consisting of a part of the judgment to be recovered, does not repeal the common law of champerty and maintenance. *Ib.*
5. **Interest in Litigation: Contract: Consideration.** A person who has an interest in the subject of litigation may lawfully contract to aid in carrying it on, without being guilty of maintenance, provided such interest has been acquired independently of the contract and is not acquired in consideration of the aid to be rendered. *Ib.*
6. **Champerty and Maintenance: Distinction: Gain.** There is a distinction between champerty and maintenance. It is not maintenance for relatives, or friends in charity, to aid one in litigation. But if they render the aid for gain of a part of the matter litigated, it becomes champerty and is forbidden by law. *Ib.*
7. **Contract: Writing: Consideration.** Though a contract is in writing and complete on its face, yet it is proper to receive oral evidence showing the consideration was unlawful. *Ib.*

ESTOPPEL. See Married Women.

1. **In Pais: Silence: Conveyances.** The presiding judge of a county court, who individually held a deed of trust on land which was also subject to a school fund mortgage given to the county, at the request of the sureties on such mortgage, attempted to sell the land, and, failing, suggested that they buy it themselves for their own protection, without mentioning his deed of trust. The sureties, relying upon their conversation with him and knowing of his close business relationship with the owner of the legal title, purchased the land without examining the records, or otherwise ascertaining the existence of the deed of trust. In an action by his trustee in bankruptcy to foreclose his deed of trust, held that plaintiff was estopped from asserting the bankrupt's mortgage lien to the prejudice of the grantees, and hence a decree giving incumbrances on the land paid by them priority over the

ESTOPPEL—Continued.

deed of trust in distributing the proceeds of the sale, although the deed of trust was duly recorded at the time they acquired the land, and although the bankrupt had no intention to defraud them, not having had the deed of trust in mind when talking with them. *Palmer v. Welch*, 580.

2. **Same.** Estoppel may arise from silence or passive conduct on the part of one who has knowledge of the facts and whose duty it is to speak, if such silence is misleading, since, although, in order to constitute an estoppel, there must be something equivalent to a representation, silence or concealment where one ought to speak is regarded as being in effect, a "representation." Ib.
3. **Same.** Where one, upon whom rests the duty of disclosing facts to another, fails to do so, his knowledge of their existence will be presumed, and his failure to disclose them, even though it be through negligence and even though he did not actually have them in mind at the time, will, when connected with other essential elements, raise an estoppel against him. Ib.
4. **Real Property: Recorded Title.** Although one's title to real property is of record, nevertheless an estoppel will arise against him, if by representations or by silence or culpable negligence he misleads another with respect thereto, whereby the latter is induced to act to his injury. Ib.
5. **Elements.** While, in order to raise an estoppel, a representation must be made with the intention, either actually, or reasonably to be inferred by the person to whom it is made, that it should be acted upon, it is not necessary that there be an intention to deceive, for, although fraud is an essential element, either actual or constructive fraud will suffice. Ib.

EVIDENCE. See Criminal Law, Death by Wrongful Act. Divorce.

1. **Inferences.** It is not necessary, in a suit at law, to prove every essential fact by direct evidence, but it is sufficient if such facts can be inferred from other circumstances and facts in evidence. *Lane v. Cunningham*, 17.
2. **Opinion Evidence: Distance Sparks Will Carry.** A witness, who had had experience with firing threshing engines, and had observed the operation of locomotives with respect to throwing off sparks when fired with wood, as compared with threshing engines, and how far such sparks carried, was competent to testify as to how far sparks from a locomotive burning wood could be carried, as compared with those thrown off by a threshing engine burning wood, although he had never operated a locomotive. *Insurance Co. v. Railroad*, 70.
3. **Opinion or Fact: Distance Sparks Will Carry.** In an action for damages from a fire alleged to have been caused by sparks from defendant's engine, testimony as to whether sparks from a fire in the yard could have ignited the roof was not opinion evidence but was testimony of a fact, and was properly admitted. Ib.
4. **Demurrer to: When Sustained.** Where there is no evidence adduced by the plaintiff to support the allegations of his petition, a demurrer to the evidence should be sustained. *Hendrick v. Harris*, 208.
5. **Directing Verdict: Province of Court and Jury.** Where the evidence is such that there cannot be two opinions about it,

EVIDENCE—Continued.

its effect should be declared by the court as a matter of law, otherwise it is a question of fact for the jury. *Jackson v. Railroad*, 430.

- *6. **Expert Witness: Scope of Testimony.** The evidence of expert witnesses concerning the competency or incompetency of the engineer engaged in running defendant's engine for hoisting and moving logs should be confined to what skill and experience is reasonably necessary in running an engine similar to the one in question and operating similar machinery and appliances. *Allen v. Lumber Co.*, 492.
7. **Parol Evidence: Explaining Written Instrument: Conveyances.** While parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument, nevertheless the writing should be read in the light of surrounding circumstances in order to more perfectly understand and explain the intent of the parties; and hence where a deed provided that the grantor was thereby released from all incumbrance on the land, which incumbrance was assumed by the grantee, it was proper to show by parol, in an action in which such assumption was sought to be enforced against the grantee, that the grantee had no knowledge of a particular incumbrance, that the grantor did not have such incumbrance in mind, and that it was not intended that the grantee should assume it. *Palmer v. Welch*, 580.
8. **Res Gestae.** While a declaration, in order to be a part of the *res gestae*, need not in every case, be coincident, in point of time, with the main fact to be proved, and while it is enough that the two be so clearly connected that, in the ordinary course of affairs, the declaration can be said to be a spontaneous exclamation of the real cause of the injury, yet such declaration must reveal a spontaneity of expression, in order to constitute it a verbal act, and if it is made even on the very scene of the accident, but a very few minutes thereafter, and purport to be a narrative of a past event, they are not to be regarded as a part of the *res gestae*. *Dudley v. Railroad*, 652.
9. **Same.** In an action for injuries to a little girl, received in a collision between a wagon in which she was riding and a railroad train, plaintiff's father, who was driving the team, in response to a question propounded by a brakeman as to how the accident happened, several minutes after the collision and while he was still on the right of way, said that "the horse got frightened and he did not think the train was so close as it happened to be and he thought he could get across ahead of it." *Held*, that this statement was a narrative of a past occurrence and hence was not admissible as a part of the *res gestae*. *Ib.*

EXECUTORS AND ADMINISTRATORS. See **Administrators**.

FALSE PRETENSES. See **Criminal Law, Fraud and Deceit**.

False Pretenses: Promises Concerning Future Events: Do Not Constitute. In a prosecution for obtaining money under false pretenses, where it appears from the testimony of the prosecuting witness that he advanced the money partly on the promise that certain railroad ties would be delivered in the future and partly on the promise that defendants would "make him whole" on another contract, held that the evidence failed to establish the charge of obtaining money under false pretenses. *State v. Krouse*, 424.

FOOD.

1. **Adulteration: Deceit is Gravamen of Offense.** The gravamen of the offense denounced by section 4841, Revised Statutes 1909, making it a misdemeanor to sell or offer to sell as cider vinegar any vinegar not the legitimate product of pure juice, known as apple cider, or not made exclusively of apple cider, is the deceit practiced upon the buyer with respect to the character of the vinegar sold. *State v. Markus*, 38.
2. **Indictments and Informations: Sufficiency of Information.** An information averring that accused "did sell and offer for sale to one . . . one barrel of vinegar labeled and branded as cider vinegar, which was not the legitimate product of pure apple juice and was not made exclusively from apple cider," does not charge an offense under section 4841, Revised Statutes 1909, for the reason that it does not aver that the cider sold was sold "as cider vinegar;" the gravamen of the offense denounced by the statute being the practicing of a deceit upon the buyer with respect to the character of the vinegar sold. *Ib.*

FRATERNAL BENEFICIARY ASSOCIATIONS.

1. **Establishing Status: Burden of Proof.** A foreign corporation, sued on a life insurance policy, which sets up in its answer that it was organized as a fraternal beneficiary association and was admitted to do business in this State as such, under article 10, chapter 33, Revised Statutes 1909, has the burden of establishing such allegation, and, in the absence, of proof thereof, it is error for the trial court to direct a verdict for such corporation on the theory that it is entitled to the rights and immunities granted to fraternal beneficiary associations by the statute. *Kribs v. Forresters*, 87.
2. **Warranties: Fraudulent Representations.** The question of false and fraudulent representations in securing an insurance policy, in an action to recover the amount of the death claim, is one of fact to be determined by the jury. *Conner v. Annuity Ass'n*, 364.
3. **Foreign Society: Evidence.** Where a fraternal beneficiary society incorporated in another State fails to prove that, at the time the policy, upon which suit is brought, was issued, it was authorized to do business in this State as a fraternal beneficiary society, the laws pertaining to old line life insurance govern the action. *Ib.*
4. **Ipso Facto Suspension: Forfeiture.** Provisions, in the laws of a fraternal society for the prompt payment of benefit assessments and prescribing a self-executory suspension and forfeiture of insurance as a penalty for failure to make prompt payments, are reasonable and will be enforced by the courts. *Knode v. M. W. A.*, 377.
5. **Failure to Pay Dues: Suspension: Notice to Member.** Where the contract, as evidenced by the certificate, constitution, and by-laws, of a fraternal society, does not make the provisions for the prompt payment of dues and assessments self-executing, but merely provides that a failure to pay shall constitute a ground for suspension and forfeiture, it does not become effective until the forfeiture and suspension are declared by the order and notice of such action given the delinquent member. *Ib.*
6. **Waiver: Dues Paid by Lodge.** Where the laws of the order do not authorize subordinate lodges to pay dues of members during sickness or allow such lodges or their officer to make agreements that would alter or waive any of the general laws, the promises

FRATERNAL BENEFICIARY ASSOCIATIONS—Continued.

and representations of the clerk of a local lodge that a member's dues will be paid by the lodge during his illness, does not constitute a waiver of the laws of the order requiring prompt payment of dues. Ib.

FRAUD AND DECEIT.

1. **Questions of Fact: Finding of Jury: Binding on Appellate Court.** Where there is evidence sufficient to take to the jury the question as to whether or not certain statements made in a prospectus are untrue, the finding of the jury on that question is binding on the appellate court, providing the instructions submitting the same are proper. Peters v. Lohman, 465.
2. **Misrepresentations: Liability of Maker.** Where representations are made, professedly not of personal knowledge, but from information obtained from others on which the utterer relied, the utterer may be held liable for misrepresentations where he does not correctly set forth the information he has obtained or where he knows, or has reason to know, that such information is not correct. Ib.
3. **False Representations: Innocently Made: Action at Law.** Representations, though false, if innocent and made without any intention to defraud and under the belief that they were true, furnish no support to the allegation of fraud and deceit, in an action at law. Ib.
4. **False Representations: "Scienter."** "Scienter," which is a guilty knowledge or a guilty lack of knowledge, is discussed in its relations to actions at law and in equity for false representations, fraud and deceit. Ib.
5. **Misrepresentations: Essential Elements.** To support a personal action for fraudulent representations, it is not sufficient to show that a party made statements which he did not know to be true and which were in fact false. There must be fraud as distinguished from mistake. Ib.
6. **Misrepresentations Innocently Made: Not Actionable.** One who has carefully endeavored to learn the truth from appropriate sources and believes that he has learned it, is not liable in an action at law for fraud and deceit. Ib.
7. **Corporations: False Prospectus: Liability of Directors.** When directors of a corporation consent to the issuance of a prospectus, stating as facts certain representations therein as to its property, which accord with the facts obtained from trustworthy sources on proper investigation and inquiry and which they honestly believe to be true, they are not liable in an action at law for fraud and deceit, although the representations in fact are false, as guilty knowledge or lack of knowledge cannot be imputed to them. Ib.
8. **Actionable Misrepresentations: Evidence Reviewed.** In an action at law against the directors of a corporation for fraud and deceit in the issuance of its prospectus, the evidence is examined and reviewed and held not sufficient to establish plaintiff's contention. Ib.
9. **Corporations: Prospectus: Meaning of "Stock Fully Paid and Nonassessable."** A representation in a prospectus that the "stock is fully paid and nonassessable" does not mean that any stock holder has paid full par value for same, but refers to the character of the stock and the liability of the stock holders to the corporation. Ib.

FRAUD AND DECEIT—Continued.

10. **Confidential Relation:** *Estoppel.* One who occupies a confidential or *quasi* confidential relationship toward another and asserts to such other as a fact that which he might have known was not a fact, is estopped to say that he did not intend to deceive the other, or that the other should not have relied upon his statements, or that he had no knowledge on the subject whatever. *Duncan v. Turner*, 661.
11. **Constructive Fraud:** *Knowledge.* Fraud is chargeable to persons who, having the means of acquiring knowledge concerning the transaction, shut their eyes to all the surrounding circumstances, and, claiming to be ignorant of the fraud, seek an advantage to themselves through it. *Veney v. Furth*, 678.

FRAUDULENT REPRESENTATIONS. See Contracts.

1. **Reliance: Opportunity for Inquiry.** Where one charges that another fraudulently and falsely represented to him that two acquaintances, living in the same town, had subscribed and paid for stock in a mining lease and that he, on the faith of that representation, subscribed and paid for \$200 worth without making inquiry of the acquaintances, it is enough to excite distrust in the mind of the chancellor whether he relied upon and was influenced by the representation. *Boatright v. Kaylor*, 312.
2. **Record: Evidence: Affirmance.** Where the record fails to show that the chancellor's finding for defendant was based upon any particular branch of the case, or part of the evidence, the defendant is entitled to an affirmance on any theory which the evidence will justify. *Ib.*

GUARANTY.

1. **Construction of Contract.** An instrument providing that, if a lessee failed to pay the rent specified in a lease or if the lease was forfeited, the person signing guaranteed the payment of rent to the lessor for three months from the date it was due and unpaid or the date the lease was forfeited, was a contract of guaranty rather than suretyship. *Fiester v. Drozda*, 604.
2. **Liability of Guarantor.** The terms of a contract of guaranty are to be strictly construed and the liability of the guarantor cannot be extended by implication, but the contract must nevertheless be construed so as to give effect to the intent of the parties. *Ib.*
3. **Subsequent Contract: Construction: Evidence.** Defendant agreed, by a written instrument, to guarantee to a lessor the payment of rent for three months from the date it was due, in the event the lessee failed to pay it. The lessee continued in possession until February 16, 1910, when he surrendered it to parties to whom he had assigned the lease on January 10, 1910. The lessor gave his consent to the assignment on condition that defendant, as guarantor, remain "fully bound by all the obligations imposed on him in said lease." By a written instrument executed February 16, 1910, defendant agreed bound by his guaranty to plaintiff and by all the conditions of the written consent of plaintiff to the assignment of the lease "in all respects as if the assignments had not been made and said consent had not been granted." In an action by the lessor on the latter instrument, for three months' rent in arrear by the assignees, held that said instrument was not a new contract of guaranty for the payment of rent by the assignees, separate from and independent of the original undertaking of the defendant, but was

GUARANTY—Continued.

merely a formal written consent of defendant to the assignment of the lease, and that defendant's obligation was limited to the original guaranty; and hence defendant, when sued on the guaranty, was entitled to prove a payment to plaintiff of rent in arrear for three months prior to the assignment of the lease, in discharge of his obligation. Ib.

4. **Same.** In such case, the fact that defendant's obligation was renewed subsequent to the time he claims it was discharged by virtue of the payment of three months' rent in arrear would not negative defendant's claim of extinguishment nor have the effect of causing the instrument of February 16 to be construed as a new contract of guaranty. Ib.
5. **Same.** In such case, the fact that defendant paid a small part of the rent for a month subsequent to the assignment would not have the effect of causing the instrument of February 16 to be construed as a new contract of guaranty; it not appearing whether defendant made such payment in discharge of what he conceived to be his obligation remaining on his original undertaking or in recognition of his liability on the instrument of February 6 as a new and separate guaranty. Ib.

GUARDIAN AND WARD.

Action on Curator's Bond: Form of Judgment. A judgment, in an action on a curator's bond, that the bond be declared forfeited and that judgment be rendered against the principal and the sureties, naming them, in the amount of the penalty of the bond, and that a special execution issue in favor of plaintiff and against defendant for the amount of damages awarded by the verdict and for costs, substantially complies with the statute. State ex rel. v. Smith, 667.

HIGHWAYS.

1. **Prescription: Statute.** Sec. 9694, R. S. 1899 (Laws 1887, p. 257), providing that no lapse of time shall divest the owner of his title to the land, unless, in addition to the use of the road by the public for a period of ten consecutive years, there shall have been public money or labor expended thereon, is not retroactive and hence does not affect roads that had been established by prescription prior to its passage. Patton v. Forgey, 1.
2. **Same.** The continued open and adverse use of land for a public road for thirty or thirty-five years prior to the passage of Sec. 9694, R. S. 1899 (Laws 1887, p. 257), established an easement therein as a public road in favor of the public. Ib.
3. **Conveyances of Land: Rights of Grantee.** The owner of land in which the public has an easement as a public road by prescription cannot oust the public of its easement by conveying the land to another, and his grantees takes subject to such easement. Ib.
4. **Obstruction: Action by Individual.** An individual cannot maintain an action to redress a public wrong, such as the obstruction of a public highway, unless he suffers or is threatened with some special or peculiar injury therefrom. Ib.
5. **Same.** In an action by an individual for the removal of an obstruction to a public highway, plaintiff showed that the obstruction diminished the value of his farm and that the road afforded him a special and peculiar convenience and furnished a shorter

HIGHWAYS—Continued.

route from his land to a certain town than any other road. *Held*, that this evidence established that the obstruction entailed a special and substantial injury upon plaintiff which was not common to others warranting his maintaining the suit. *Ib.*

6. **Estoppel: Conveyances.** The fact that one who brought suit for the removal of an obstruction to a public highway had previously conveyed the land, over which the highway ran, to defendant by a warranty deed containing a covenant importing an indefeasible seisin would not prevent his maintaining the suit, notwithstanding, in order to maintain it, it was necessary for him to show that he had suffered special injury by the obstruction, since the suit was instituted to maintain a public right. *Ib.*

INDICTMENTS AND INFORMATIONS.

Charging Statutory Offenses. Where the indictment or information is based upon a statute denouncing an offense unknown to the common law, it must aver every constituent fact necessary to bring the accused within the statute. *State v. Markus*, 38.

INSANE PERSONS.

Inquisition De Lunatico: Appeal from Order Granting New Trial: Jurisdiction of Circuit Court. The circuit court has no jurisdiction of an appeal from an order of the probate court granting a new trial in an *inquisition de lunatico*. *State ex rel. v. McQuillin*, 106.

INSTRUCTIONS. See Automobiles.

1. **Refusal: Commentary on Evidence.** An instruction which comments on particular facts is properly refused. *Insurance Co. v. Railroad*, 70.
2. **Evidence Not Supporting: Erroneous.** An instruction is erroneous which submits to the jury a theory not supported by the evidence. *Kendrick v. Harris*, 208.
3. **Objections to Because of Insufficiency of Evidence: Inferences.** Where an issue has been submitted to a jury on proper instructions and complaint is made that there is no evidence sufficient to warrant its submission to the jury, all the facts which the evidence tends to establish or which may be reasonably inferred therefrom are taken as admitted and will be considered in the most favorable light to the plaintiff. *Ib.*
4. **Complaint Against: When Groundless.** Plaintiff cannot complain of instructions based upon the same theory and which are the converse of those asked by himself. *Wallower v. Webb City*, 214.
5. **Witnesses: Comment Upon Testimony.** An instruction, which singles out plaintiff and comments upon his testimony is erroneous and has been repeatedly condemned by the Supreme Court. *Meyers v. Railroad*, 283.
6. **Error in: Appellant Cannot Complain of Error in His Favor.** In an action against a street railroad for personal injuries where several grounds of negligence are alleged, an instruction drawn in the conjunctive, requiring the jury to find defendant guilty of all the acts of negligence charged as the condition of a verdict for plaintiff, furnished no ground for complaint on the part of the defendant, inasmuch as it imposed on the plaintiff the duty of

INSTRUCTIONS—Continued.

- proving more than the law required in order to make a case and was favorable to the defendant rather than adverse. *Jackson v. Railroad*, 430.
7. **Refusal: When Proper.** (a) A requested instruction that it was negligence for the plaintiff approaching a railroad crossing on a motor cycle not to stop or check his motor cycle to enable him to see and hear the approaching car, regardless of his speed, was properly refused. (b) An instruction should not be given unless there is evidence on which to base it. (c) Instructions are properly refused when based upon a dismissed count of a petition. (d) Instructions not based upon any issue in the case are properly refused. (e) An instruction should not be given when other instructions sufficiently covering the same matters have already been given. *Ib.*
 8. **Must be Based on Evidence.** An instruction which submits to the jury a question of negligence concerning which there is no evidence, is erroneous. *Allen v. Lumber Co.*, 492.
 9. **Inconsistent Instructions: Error.** In an action by the servant against the master for injuries occasioned by the alleged negligence of a fellow-servant causing a log to strike and injure plaintiff, instructions held to be inconsistent and erroneous, which, on the one hand, told the jury that they might find defendant was guilty of certain acts of negligence and, on the other hand, directed them not to allow the plaintiff any damages resulting from such negligence. *Ib.*
 10. **Inconsistent Instructions: Error.** Other instructions on the issue of negligence examined and held to be so inconsistent and irreconcilable with the instruction on the measure of damages as to constitute reversible error. *Ib.*
 11. **Ignoring Defense.** An instruction which purports to cover the whole case and allows a verdict for plaintiff must not ignore matters of defense. *Johnson v. Building Co.*, 543.
 12. **Nondirection:** In civil cases, mere non-direction is not a ground for granting a new trial. *Ib.*
 13. **Refusal to Modify.** In a civil action, a refusal of the court to correct its instruction by an addition to it is not erroneous unless the addition requested is correct, from a legal standpoint. *Ib.*

INSURANCE, ACCIDENT. See Married Women.

1. **Notice of Injury: Waiver.** Where early notice of injury was not given, as required by an accident insurance policy, and the insurer's general agent denied all liability when notice was served, but its adjuster called on insured and discussed a settlement, and later sent a check in the form of a receipt in full, which insured rejected, and afterwards its physician examined insured, and it finally rejected the claim, resting its refusal on the assertion that insured was suffering from malaria, and not from injury, the requirement of early notice was waived; the purpose of such requirement being, to advise insurer of the probable claim to be presented and to afford it an opportunity to investigate the same. *Brix v. Fidelity Co.*, 518.
2. **Effect of Failure to Give.** At most, the failure of an insured to give early notice of an accident, as required by an accident insurance policy, merely authorizes the insurer to declare a forfeiture of the claim for that cause. *Ib.*

INSURANCE, ACCIDENT—Continued.

3. **Waiver.** The requirement in an accident insurance policy that insured give insurer early notice of an accident is for the benefit of insurer and can be waived by it. Ib.
4. **Notice of Injury: Waiver.** A waiver once attached cannot be thereafter recalled, and hence where the conduct of an insurer amounted to a waiver of a requirement of early notice of injury under an accident policy, it could not thereafter recall the waiver and declare a forfeiture. Ib.
5. **Amount of Recovery: Right of Court to Fix.** A provision in an accident insurance policy that, for partial disability, an amount, to be determined by insurer, within certain maximum and minimum limits, shall be paid insured, gives insurer the right to determine, in the first instance, the amount to be paid; but if insurer refuses to perform this function, it is competent for the court to do it. Ib.
6. **Same.** In an action on an accident insurance policy, which provided that, for partial disability, an amount, to be determined by insurer, within certain maximum and minimum limits, shall be paid insured, where insurer denied any liability, held that the court was justified, under the evidence in awarding insured the maximum amount. Ib.

INSURANCE, FIRE.

Assigned Claim: Action by Insurance Company: Measure of Damages. Where an insurance company paid insurance on a house alleged to have been burned through the negligence of a railroad company, and the insured assigned his cause of action to it, the measure of recovery, in an action by it against the railroad company was the full amount of the damage sustained, irrespective of what might have been recovered under the policy; the action being on the assignment and not on a right obtained through subrogation. *Insurance v. Railroad*, 70.

INTERPLEADER.

Equity: Law. Where a bill of interpleader is filed asking that opposing claimants interplead for a certain fund, the proceeding is in equity and should not be tried, as a case at law. *Taylor v. Perkins*, 246.

JUDGMENTS. See Jurisdiction.

1. **Final Judgments: Must Dispose of all Parties.** A defendant who is not shown to be liable should be discharged by the final judgment, in view of Sec. 2097, R. S. 1909, which provides that there shall be but one final judgment in the case, and the rule which requires that such a judgment shall dispose of all the parties. *Patton v. Forgey*, 1.
2. **By Default: Setting Aside:** Requirements for. The setting aside of a judgment by default is addressed to the sound discretion of the trial court and to justify that court in setting aside such judgment the defendant must show (1) that he had good reason for the default and (2) that he has a meritorious defense; and both of these things must appear so clearly as to make it manifest that the refusal of the trial court was arbitrary. *Bank v. Martin*, 194.
3. **By Default: Vacating: Proposed Defense Must be Meritorious.** A default judgment was entered against the defendants on certain promissory notes, payable absolutely. Five days thereafter

JUDGMENTS—Continued.

a motion was filed to set aside same because of the illness of defendants' attorney at the time of hearing the case. Accompanying this motion was the answer of the defendants which set up as a defense to the notes an oral agreement at the time the notes were made to the effect that defendants were to have the use of the borrowed money until they could fatten certain hogs, to purchase which the money was borrowed. And that it was orally agreed at that time that the plaintiff bank should advance such additional sums of money as the defendants might need to purchase feed for the hogs until time for marketing same, which the bank refused to do; and except for such promises and agreements, defendants would not have borrowed the money or executed the notes in question. *Held*, that such answer did not show a meritorious defense to plaintiff's action and that the action of the trial court in refusing to set aside the default judgment was proper. *Ib.*

4. **Should be Just: Relief Afforded by Equity.** A judgment should never be permitted to defeat justice and any fact which clearly proves it to be against conscience to execute a judgment and of which the injured party could not avail himself in a court of law, will justify relief in equity. *Sullivan v. Kirkpatrick*, 233.
5. **Dismissal Without Prejudice: Not a Bar to Further Action.** A judgment which shows that plaintiff's petition was dismissed "without prejudice" does not bar another suit on the same cause of action. *Sursa v. Cash*, 396.

JURISDICTION. See Courts.

1. **Courts of Appeal: Should Settle Questions Concerning.** It is the duty of the appellate court to settle questions concerning its jurisdiction of an appeal, although such jurisdiction has not been directly questioned by the parties to the suit. *Bingaman v. Hannah*, 186.
2. **Judgments: Nonresidents.** A personal judgment cannot be had against a nonresident of the State who is not personally served in the State. *Palmer v. Welch*, 580.

JUSTICE OF PEACE. See Appeal and Error.**LANDLORD AND TENANT.**

1. **Breach of Covenant: Measure of Damages.** Where an eviction of a lessee is occasioned through the fault of the lessor, the measure of damages to the lessee for the breach of a covenant for quiet enjoyment is the value of the unexpired term, less the rent reserved. *Harrison v. Coleman*, 633.
2. **Breach of Covenant: General Damages: Pleading.** In an action by a lessee for breach of a covenant for quiet enjoyment, damages to the amount of the value of the unexpired term, less the rent reserved, may be recovered under a general allegation of damages, inasmuch as this is the natural result of the breach and hence is an element of general damages. *Ib.*

MAINTENANCE. See Divorce.

Sufficiency of Evidence: Appellate Practice. In a suit by a wife for maintenance, defended on the theory that plaintiff had been guilty of conduct justifying defendant in abandoning her, *held*, under conflicting evidence, that a judgment for plaintiff would not be disturbed on appeal. *Arste v. Arste*, 649.

MANDAMUS.

1. **Motion to Quash Writ: Admits Well-pleaded Facts.** A motion to quash an alternative writ of mandamus admits all the allegations that are well pleaded. *State ex rel. v. Hitchcock*, 109.
2. **Free Transcripts to Poor Persons: Courts: Court Stenographers.** A trial judge who refuses to order the court stenographer to furnish a transcript of the proceedings to a person allowed to sue as a poor person, without the payment of the fees chargeable therefor will be required by mandamus to make such an order. *Ib.*

MARRIED WOMEN.

1. **Right of Recovery: Accident Insurance.** Sec. 8304, R. S. 1909, declaring that a married woman shall be deemed a *femme sole* and may contract and sue and be sued to enforce such contracts, does not suggest that a married woman must be engaged in some business before she is entitled to recover on contracts assuring a right to her, and hence a recovery by a married woman on an accident insurance policy cannot be defeated on the ground that, she not being in business, her husband alone is entitled to her services and alone entitled to recover therefor. *Brix v. Fidelity Co.*, 518.
2. **Estopel.** An insurance company which issues an accident insurance policy and accepts premiums from a married woman is estopped to dispute its obligation to her for her loss of time, upon an accident occurring, on the ground that, inasmuch as she was not engaged in business, her husband alone was entitled to recover for her loss of time. *Ib.*

MASTER AND SERVANT.

1. **Injury to Servant: Falling Into Unguarded Pit: Proximate Cause.** An employee, while endeavoring to start a steam pump by means of a lever, lost his balance and fell into an unguarded pit adjacent to the pump, as a result of a sudden jerk of the lever, sustaining injuries he would not have received if the pit had been reasonably guarded so as to prevent persons from falling into it. *Held*, that the failure to guard the pit, and not the sudden jerk of the lever, was the proximate cause of his injuries. *Brueggemann v. Ice Co.*, 59.
2. **Personal Injuries: Instruction: Refusal: Harmless' Error.** In an action for damages by a railroad fireman against a railroad company on account of personal injuries, *although* a requested instruction which defined the duty of the master to the servant in the furnishing and handling of appliances was proper and might well have been given by the trial court, *yet* its refusal did not constitute reversible error where the instructions which were given clearly instructed the jury concerning the duty of the defendant to exercise ordinary care and diligence in furnishing the appliance, and instructed that, if they should find that the plaintiff was guilty of contributory negligence, they should find for the defendant. *Rhea v. Railroad*, 160.
3. **Instructions: Refusal of Adversary's Instruction: Cannot Complain of.** A party cannot except to the action of the trial court in refusing instructions which the adverse party has requested. *Ib.*
4. **Liability of Master: Defective Appliances: Evidence Reviewed.** In an action by a railroad fireman against a railway company for personal injuries, which were occasioned by the giving way

MASTER AND SERVANT—Continued.

of a grab iron on account of the loss of a set screw therewith connected, when the fireman was attempting to alight from the engine, the evidence is examined and reviewed and held sufficient to warrant the jury in finding that the grab iron became defective on account of the set screw being out, and that it was out and defective for such a length of time as to impute knowledge to the defendant. Ib.

5. **Negligence: Proof of: Proper Inferences.** Proof of negligence is not conjectural where established by facts from which a logical inference may be drawn that the defects caused the accident. Ib.
6. **Appliances Furnished: Master's Duty Concerning: Servant's Right of Reliance.** An ever present and continuing duty rests upon the master to use ordinary care to furnish reasonably safe appliances. He must keep the appliances in repair so far as it can be done by the exercise of ordinary care, diligence and inspection. In the absence of knowledge of a defect in the appliances being brought home to the servant, he has a right to rely upon the master faithfully performing that duty. Ib.
7. **Personal Injury: Negligence: Question for Jury.** In an action by a railroad fireman against the railroad company for injuries which were occasioned by the giving way of a grab iron due to the loss of a set screw, on an engine from which plaintiff was alighting, it was a question for the determination of the jury whether the defendant company exercised such reasonable care and inspection as to have discerned the fact that the screw was missing or that it was loose. And the finding of the jury, under proper instructions, should not be disturbed by the appellate court. Ib.
8. **Injury to Servant: Two Possible Causes: Rule of Law.** Where in the case stated, it is uncontested that the cause of the fall which occasioned the injury to plaintiff was the giving way of the grab iron, in the absence of contributory negligence, no application can be made of the rule that where the injury may have resulted from one of two causes, for one of which and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result; and if the evidence leaves it to conjecture, the plaintiff must fail in his action. Ib.
9. **Contributory Negligence: What is.** Where the servant of his own free will chooses an unsafe manner of doing his work or using the master's appliances, when other and safe ways are at hand, he will not be permitted to recover for an injury, provided the way he has chosen is so dangerous that an ordinarily prudent person would not have selected it. Ib.
10. **What is Not.** It is not contributory negligence on the part of the servant to follow a custom habitually followed by his fellow-servants, to the knowledge of the master, unless the danger is so obvious that an ordinarily prudent person would refuse to take the risk arising from such method of work. Ib.
11. **Contributory Negligence: Question for the Jury.** Contributory negligence as a matter of law cannot be charged to a railroad fireman who was injured in attempting to alight from an engine going at the rate of six miles an hour, when he thought the safety appliances were in proper condition and where the place at which he alighted was a safe one. It is a question about which reasonable minds might differ as to the hazards connected with the act and should be submitted to the jury under proper instructions. Ib.

MASTER AND SERVANT—Continued.

12. **Degree of Care Required of Servant.** In the use of appliances furnished by the master, the servant is held only to that degree of care which an ordinarily prudent man would exercise under the same or similar circumstances. Ib.
13. **Scope of Employment: Includes What.** *Although* a fireman, whose duty it was to go to the roundhouse and prepare his engine for his trip, was not in control of the engine while riding from the roundhouse to the station, and *although* his act in swinging from the engine for the purpose of going to a nearby lunch room to get a cup of coffee before making his trip, cannot be said to be such an act as was necessary to be done for the defendant company, *yet* he was on the engine in the course of his employment and the attempt to alight was not unusual, unwarranted, unlawful or unnecessary. *Held*, that he was within the line of his employment from the time he went to the roundhouse until he fell, in attempting to alight from the engine, and was injured. Ib.
14. **Negligence: Contributory Negligence.** In an action against the master by a servant for personal injuries occasioned by the alleged incompetency and habitual negligence of a fellow-servant, the evidence is examined and reviewed. *Held*, that the question of contributory negligence on the part of the plaintiff is not in the case. *Allen v. Lumber Co.*, 492.
15. **Fellow-servant's Negligence or Incompetency: Master Liable, When.** In an action by a servant against the master for personal injuries sustained by reason of the alleged incompetency or habitual negligence of a fellow-servant, to render the master liable it must be shown that the servant whose negligence caused the injury was habitually negligent or incompetent; that the injury complained of was caused by the servant's habitual negligence or incompetency; that the fact of the habitual negligence or incompetency of the servant was known, or by the exercise of reasonable care could have been known, to the master and that the master after such actual or constructive knowledge, negligently retained the servant. Ib.
16. **Injury Sustained and Alleged Incompetency Must be Connected.** To render a master liable for the incompetency or habitual carelessness of a fellow-servant, it should be shown that the particular trait of character making such fellow-servant incompetent, contributed to the particular injury in question. Ib.
17. **Fellow-Servant's Negligence or Incompetency: Evidence to Establish.** In an action against a master by a servant on account of personal injuries occasioned by the alleged incompetency and habitual negligence of a fellow-servant, it is necessary to prove both that the fellow-servant was "fractious" and high tempered and in such condition was liable to be reckless and rash, and that such fellow-servant was "fractious" and angry at the time the injury occurred. Ib.
18. **Guards for Machinery: Statutory Provisions Examined.** Sec. 7828, R. S. 1909, requiring the safe-guarding of certain machinery held to be effective in an action by the servant against the master on account of personal injuries, without the notice to the master from the State factory inspector to maintain such safeguards, as provided by Sec. 7842, R. S. 1909. *Brashears v. Iron Works Co.*, 507.
19. **Duty and Liability under Common Law: Under Statutory Provisions.** Duty and liability of master to servant relative to

MASTER AND SERVANT—Continued.

safeguarding certain machinery, considered in the light of the common law and statutory provisions. Ib.

20. **Action for Death of Car Repairer: Sufficiency of Evidence.** In an action for the death of a car repairer, who, while working under a car being built by defendant, was run over by reason of a train of cars operated by defendant striking the car under which he was working, evidence that no warning was given him of the approaching train *held* sufficient to take the case to the jury on the question of defendant's negligence. *Kettlehake v. Foundry Co.*, 528.
21. **Action for Death of Car Repairer: Assumption of Risk.** In an action for the death of a car repairer, who, while at work under a car being built by defendant, was run over as the result of said car being struck by a train of cars operated by defendant without any warning being given of its approach, *held* that decedent did not assume the risk of injury as a matter of law. Ib.
22. **Liability of Master.** The employer's duty to furnish his employees a reasonably safe place in which to work is a continuing one, and hence where a car under which an employee was working was safe at the time he commenced work, but was subsequently made unsafe by the employer's negligence in causing a train of cars to strike it, without giving warning to the employee, as result of which he was killed, the employer was liable for his death, and a recovery could not be denied his widow, in an action under Sec. 5425, R. S. 1909, on the theory that he assumed the risk of injury. Ib.
23. **Safe Place to Work.** An employee may assume, in the absence of contrary knowledge, that the employer will furnish him with a reasonably safe place in which to work and will not imperil his safety, and hence a car repairer who was at work under a car had the right to assume that his employer would not cause the car to be moved without first notifying him. Ib.

MECHANICS' LIENS.

1. **Possession Under Contract of Purchase.** One who contracts with a person in possession of premises under a contract of purchase containing no provision for improvements, to furnish material for the repair of a building on said premises and does furnish such material, has no lien upon the building, where the purchaser's estate in said property has ended before the action to enforce the lien is commenced. *Ford v. Dixon*, 275.
2. **Right to Amend Statement.** A person who has filed a mechanic's lien statement, in accordance with Sec. 8217, R. S. 1909, may file an amended statement within the time limited in that section. *Lumber Co. v. Realty Co.*, 614.
3. **Right to Commence New Action.** The plaintiff may dismiss an action to enforce a mechanic's lien and commence a new action within the time limited in Sec. 8228, R. S. 1909. Ib.
4. **Statement: "Lien" Defined.** The lien statement in a mechanic's lien proceeding is not the lien; the latter being the charge upon the property arising by operation of law upon the filing of a proper lien statement within the required time. Ib.
5. **Effect of Amending Statement.** A lienor, having filed a lien statement for a mechanic's lien, does not abandon the lien arising therefrom by operation of law by reason of thereafter filing an amended statement. Ib.

MECHANICS' LIENS—Continued.

6. **Construction of Statute.** The mechanics' lien law should be liberally construed. *Ib.*
7. **Right to Amend Petition: Pleading.** Great liberality is allowed in amending petitions in actions to enforce mechanics' liens. *Ib.*
8. **Effect of Amending Statement and Petition.** A materialman, after filing a statement for a mechanic's lien and instituting suit to enforce the lien, may, within the time limited in Art. 3, chap. 34, R. S. 1909, file a second lien statement containing an amended description of the property, and amend his petition to conform thereto; the filing of the second statement not being an abandonment of the lien which arose by operation of law upon the filing of the first statement, and the amended petition, although relating back to the institution of the suit, not counting upon a new cause of action nor seeking to enforce a new or a different lien. *Ib.*
9. **Pleading: Scope of Demurrer.** An objection that the notice of a mechanic's lien required by Sec. 8231, R. S. 1909, incorrectly described the property cannot be reached by demurrer where there is nothing on the face of the petition to show that fact. *Ib.*
10. **Amending Statement: Notice.** Where an amended lien statement was filed in a proceeding by a materialman for a mechanic's lien and the petition was amended to conform thereto, a notice given as provided by Sec. 8231, R. S. 1009, prior to the filing of the first statement was all that was required, and it was not necessary to give another notice prior to the filing of the amended statement. *Ib.*
11. **Sufficiency of Description.** In a proceeding by a materialman to enforce a mechanic's lien, the original statement filed described the property as follows: "Lot 21 and the northern 18 ft. of lot 22 of Randall & State Savings Assn.'s subdivision in block 1899 in the city of St. Louis, fronting 38 ft. on the east line of Baldwin street, by a depth northwardly of 128 ft. 6 in. to an alley." An amended lien statement filed described the property as follows: "Lot 21 and lot 22 of Randall and State Savings Assn. subdivision in block 1899 of the city of St. Louis, which said lots are contiguous and front 40 ft. on the east line of Baldwin street by a depth extending eastwardly of 128 ft. 6 in. to an alley." The notice given, as required by Sec. 8231, R. S. 1909, contained the description set out in the original statement, and no notice was given prior to the filing of the amended statement. *Held,* that the notice was sufficient to point out and identify the property in question. *Ib.*

MISCONDUCT OF COUNSEL.

Prejudicial Remarks. Remarks of counsel alleged to be prejudicial addressed to issues improperly submitted at the request of the opposing party, could not have been prejudicial and afford no ground for setting aside a verdict. *Music Co. v. Grannis*, 392.

MORTGAGES AND DEEDS OF TRUST.

1. **Covenant to Pay Taxes: "Agreed."** A provision in a deed of trust, that the mortgagor "has also agreed with the *cestui que trusti* to cause all taxes imposed upon the property to be paid within the time required by law," is an express covenant on the part of the mortgagor to pay the taxes; the word "agreed" implying a meeting of the minds or that one binds himself to act or fulfill the agreement. *Truchon v. Mackey*, 42.

MORTGAGES AND DEEDS OF TRUST—Continued.

2. **Foreclosure: Judgment: Disposition of Parties.** Where, in a suit to foreclose a deed of trust, the court correctly determined that grantees of the land were not personally liable, a judgment should have been rendered for them on plaintiff's demand for a deficiency judgment, in order that that issue be definitely settled. *Palmer v. Welch*, 580.

MUNICIPAL CORPORATIONS.

1. **Consolidation: Liability for Debts of Constituent Members.** The rule that a consolidated corporation is liable for the outstanding liabilities of its constituent members under certain circumstances applies to a consolidated municipal corporation. *Winkleman v. Levee District*, 49.
2. **Streets: Duty of One Using: Obstructions.** Where plaintiff's automobile, which he was at the time driving, was injured by coming in contact with a rope stretched from a building, under construction, across the street to a telephone pole, an instruction was not erroneous which told the jury that "every person using the streets of a city owes the duty to the city and to every other person using the streets, to exercise care to see and avoid obstructions in the street." *Wallower v. Webb City*, 214.
3. **Streets: Objection of: Negligence: Question for the Jury.** Where a contractor stretched a rope across the street so as to obstruct a small portion of it to persons in automobiles, such act was not necessarily, and as a matter of law, an act of negligence. It was a question for the jury under all the facts whether or not it was negligence. *Ib.*
4. **Obstructions in Street: Care Required of Traveler.** It is the duty of a traveler upon a public highway not only to use care to avoid known and expected obstructions and defects, but also to discover those which are unknown and unexpected and which are unlawfully there. *Ib.*
5. **Street Commissioner: Discharge: Civil Service.** The charter of Kansas City does not give a fixed and definite term to the position of district superintendent of streets, and, subject to the provisions of the charter in relation to civil service, he may be discharged by the street commissioner at any time. *Chestnut v. Kansas City*, 327.
6. **District Superintendent: Salary: Service.** A district superintendent of streets was verbally appointed by the street commissioner of Kansas City for and during a certain mayoralty administration, his salary being at the rate of \$1000 a year. He was suspended for want of funds, for a period of six weeks, during which time the city refused to pay him. It was held that he had no cause of action against the city. *Ib.*

NEGLIGENCE. See Automobiles, Master and Servant.

1. **Pleading: General Allegation: Sufficient Unless Objected to.** A general plea of negligence, whether in the petition or answer, is sufficient without specifying the particular acts, unless objected to by motion or otherwise, before trial. *Wallower v. Webb City*, 214.
2. **Obstruction in Street: Notice of by City: When not Material.** Where a contractor and a city are jointly sued, the contractor for placing an obstruction across a street in a city which caused the injury complained of by the plaintiff and the city is sued for per-

NEGLIGENCE—Continued.

mitting the alleged negligent obstruction of the street, it being obvious from the finding of the jury that they considered either that there was no negligence proven on the part of the defendants or that the plaintiff was guilty of such contributory negligence as precluded his recovery, the question of the city having notice of the obstruction, actual or constructive, becomes of no consequence in the case. Ib.

3. **Obstructing Street: Evidence: Usual and Customary Manner of Doing Work.** Where the question whether or not a certain act is or is not negligence is a debatable one, it is not error to permit proof that such act was done in the usual and customary manner. Ib.
4. **Injury to Animals: Evidence: Sufficiency of.** An action for injuries sustained by plaintiff's horse, occasioned by defendant chasing a bull on horseback, which caused the horse to become frightened and run against a barbed wire fence. Evidence examined and reviewed and *held* sufficient to warrant the trial court submitting the case to the jury. *Kendrick v. Harris*, 208.
5. **Blasting: Jury Question.** Where the customary number of holes drilled for blasting rock at a quarry, was from 2 to 7, and in the instance in controversy it was 11, and where in "springing" the holes for loading with explosives, it was noticed that the smoke would come out of the side of the ledge, showing the rock to have "seams" in it, and where the explosion following was of extraordinary destructive force, casting rock of great size horizontally a distance of 300 feet, some of the smaller rock striking and killing a workman—it was held that this was sufficient evidence of negligence to submit to a jury. *Bolger v. Material Co.*, 261.
6. **Contributory Negligence: Jury.** Where, in protecting himself from a blast in a rock quarry one of the workmen got under a railway car 300 feet away, a place the men had customarily used for protection, it was *held* that it should not be said, as a matter of law, that he was guilty of contributory negligence. Ib.
7. **Petition: Cause of Action: Statute of Jeofails.** Where a petition, though defective, states a cause of action, the statute of jeofails will cure its defects after verdict. Ib.
8. **Pleading: Specific Allegations.** A plaintiff, who specifies in his petition the precise manner of his injury, will be held to his specifications and will not be allowed to recover on any different state of facts. *Meyers v. Railroad*, 283.
9. **Pleading: Evidence: Variance.** Where a petition alleges the ditch or excavation where the accident occurred to be square across a passageway or footpath, and the evidence of plaintiff, introduced without objection, showed that the ditch was to one side in dangerous proximity to pedestrians using the passageway at night, there is no variance between the allegation and proof. Ib.
10. **Invitee: Duty of Railroad.** One who goes upon the property of a railroad to transact business with the company, is an invitee and the company owes him the duty of reasonable care to keep the way free from snares and pitfalls, that might entrap the unwary traveler. Ib.
11. **Alleging Several Grounds of: Proof of One Sufficient.** In an action against a street railroad company for personal injuries, where an instruction predicates plaintiff's right to recover on several grounds of negligence, all of which must be found for the

NEGLIGENCE—Continued.

plaintiff before he can recover, held that it is sufficient to sustain a judgment for plaintiff if any one of such grounds constitutes actionable negligence and is supported by the evidence. *Jackson v. Railroad*, 430.

12. **Personal Injuries: Evidence Reviewed.** In an action against a street railroad company for personal injuries on account of negligence, the evidence is examined and reviewed and *held* sufficient to warrant the jury in finding the defendant guilty of actionable negligence. *Ib.*
13. **Personal Injuries: Contributory Negligence.** In an action against a street railroad company for personal injuries occasioned by a collision between one of defendant's cars and a motor cycle ridden by plaintiff, the evidence is examined and reviewed and *held* to warrant the jury in finding the plaintiff not guilty of contributory negligence. *Ib.*
14. **Contributory Negligence: Sudden Peril.** Though a pedestrian struck by an automobile might, by acting in a different manner than he did, have escaped the peril in which he was placed, he may recover for his injury, if, in seeking, as he did, to avoid the peril, he acted with ordinary care. *Hodges v. Chambers*, 563.
15. **Undisputed Facts: Question for Jury.** The question of whether or not a person was negligent may not be declared as a conclusion of law, even on undisputed facts, where reasonable men would differ with respect to the conclusion to be drawn therefrom. *Dings v. Pullman Co.*, 643.
16. **Imputed Negligence: Parent and Child.** The negligence of a father of a little girl, riding with him, in driving upon a railroad track in front of a train cannot be imputed to her. *Dudley v. Railroad*, 652.
17. **Liability of Joint Tort-feasor: Parent and Child.** A defendant is liable for injuries to a little girl, even though its negligence concurred with the negligence of her father in producing her injuries. *Ib.*
18. **Liability of Joint-tortfeasor: Joint or Several Action.** Joint tort-feasors may be required to respond, either jointly or severally as plaintiff may elect, for an injury resulting from their concurring negligence. *Ib.*
19. **Action for Death: Evidence: Presumptions.** In an action for death, it is presumed that decedent did not commit suicide; and if there is any ground for presumption, it is directly against that of carelessness, which, usually being contributory negligence, must be alleged and proved by defendant. *Peperkorn v. Transfer Co.*, 709.
20. **Speculation and Conjecture: Instructions.** In an action for death, where there was no reason to suppose that the death occurred in any other way than by the means alleged, in instruction requested by defendant, cautioning the jury against speculation, conjecture and guess work and charging that, if they were unable to determine the cause of death, except by speculation, to find for defendant, was properly refused, for the reason that it would have been misleading. *Ib.*

NEGOTIABLE INSTRUMENTS.

Judgment: Merger: Interest: Future Actions. Where an indorsee and owner of a negotiable promissory note brings an action thereon

NEGOTIABLE INSTRUMENTS—Continued.

against the maker, it becomes merged in the judgment and though all the interest due on the note is knowingly not claimed, no separate and independent action can be thereafter maintained on such note for the interest. *Bank v. Witmer*, 352.

PARENT AND CHILD.

Liability of Parent. Where a person assumed toward a child, not his own, a parental character, holds the child out to the world as a member of his family toward whom he owes the discharge of parental duties, he stands in *loco parentis* to the child and his liability is measured by that of the relationship he thus chooses to assume. *Dix v. Martin*, 266.

PARTIES TO ACTION.

1. **Trade Name: Real Party in Interest.** Where a real party in interest sues, or is sued, in a name by which he is known to the world and such name is the name of a natural or artificial person, the action cannot be treated as a nullity, though such name is not the real name of the party. *Bowen v. Buckner*, 384.
2. **Name Adopted: Fraud.** In the absence of fraud, a person may do business and execute contracts in any name he or she has chosen to assume and has a perfect right to sue and be sued in such name. *Ib.*
3. **Pleading: Misnomer.** A civil action can be maintained only against a legal person, but that if the fault of the petition consisted of the misnomer of a legally existing defendant, the plaintiff has a true action, subject only to defendant's right to object at the threshold for misnomer. *Ib.*

PERSONAL INJURIES. See Damages; Master and Servant.**PLEADING.**

1. **Variance: Action on Joint Contract: Recovery on Several Contract.** Where, in an action against two or more defendants, the petition counts on a joint contract, but the evidence discloses a contract with only one of the defendants, a recovery may be had against such defendant. *Laumeier v. Dolph*, 81.
2. **Amendments: Refusal to Grant Continuance: Not Error, When.** In an action against a street railroad company for personal injuries, at the close of his evidence, plaintiff by leave of court, amended his petition by inserting a third ground of negligence which was substantially the same as one alleged in a count of the original petition. *Held*, that the refusal of the trial court to grant a continuance to defendant on the ground of surprise was not such an abuse of its discretion as to call for a reversal of the case. *Jackson v. Railroad*, 430.
3. **Negligence: Contributory Negligence.** It is the duty of both plaintiff and defendant in the first instance to plead the facts constituting negligence on the one hand or contributory negligence on the other. *Allen v. Lumber Co.*, 492.
4. **Waiving Insufficiency of: Appellate Court Will Not Review Error.** The appellate court will treat the pleadings as sufficient, where the parties to the case try same on the theory that the issue is raised by the pleadings, proceed to trial without filing motion to make more definite and specific and, without objection, allow evidence of negligence or contributory negligence to be admitted. *Ib.*

PLEADING—Continued.

5. **Action on Contract: Sufficiency of Petition.** A petition, in an action on a contract, which pleads the general tenor and legal effect of the contract is sufficient. *Johnson v. Building Co.*, 543.
6. **Amendments: Doctrine of "Relation."** The general rule is, that an amended petition relates back to the institution of the suit; but this doctrine is a mere fiction of the law and should be resorted to only for promoting justice and the lawful intention of the parties, by giving effect to acts or instruments which, without it, would be invalid. *Lumber Co. v. Realty Co.*, 614.
7. **Departure: Demurrer.** An objection that an amended petition is a departure from the original petition cannot be reached by demurrer. *Ib.*
8. **Demurrer: Scope.** Matters not appearing on the face of the petition cannot be reached by demurrer. *Ib.*
9. **Amendments: Construction of Statute.** The provisions of the code providing for amendments to pleadings should be liberally construed. *Ib.*

PRACTICE, APPELLATE.

1. **Rendition of Judgment by Appellate Court: Equitable Proceeding.** Under Sec. 2083, R. S. 1909, appellate courts are authorized to enter such judgments as should have been given by the *nisi prius* court, and especially is this true in an equity case. *Patton v. Forgey*, 1.
2. In a proceeding in equity against two defendants, where one was shown to be liable and the other not liable, and the final judgment failed to discharge the latter, *held*, that the appellate court, on finding the record free from error as to the defendant found liable, would affirm the judgment as to him, and would enter a judgment discharging the other defendant and award him his costs. *Ib.*
3. **Supreme Court: Controlling Effect of Decision.** Under section 6 of the Amendment to the Constitution of 1884, providing that the last prior ruling of the Supreme Court shall be controlling authority in the Courts of Appeals, the Courts of Appeals are controlled by the judgment of the Supreme Court directly in point. *Bussiere v. Sayman*, 11.
4. **Conflicting Decisions: Disposition of Case.** Where a decision of one of the Courts of Appeals, conforming to the last prior ruling of the Supreme Court, is in conflict with a decision of one of the other Courts of Appeals, rendered subsequent to the decision of the Supreme Court, the case will be certified to the Supreme Court for final determination, in accordance with the requirements of section 6 of the Amendment to the Constitution of 1884. *Ib.*
5. **Conflicting Decisions: Certification to Supreme Court.** Where a decision of one of the Courts of Appeals is in conflict with a decision of one of the other Courts of Appeals, the case should be certified to the Supreme Court for final determination, conformably to section 6 of the Amendment of 1884 to Art. 6 of the Constitution. *Leavea v. Railroad*, 24.
6. **Former Decision: Law of Case.** The decision rendered in a case by an appellate court is the law of the case on a subsequent appeal. *State ex rel. v. Smith*, 67.
7. **Effect of Assuming Position in Litigation: Estoppel.** Where, throughout long-pending litigation, a party sought to sustain him-

PRACTICE, APPELLATE—Continued.

- self as curator, a subsequent claim by him, in an action on his bond, that he was only chargeable, if at all, as an administrator, came too late. Ib.
8. **Admitting Evidence on Wrong Theory: Harmless Error.** In an action on an assigned claim, where it is not shown that the assignor has any pecuniary interest in it, his wife is a competent witness for the assignee; and the fact that the court permits her to testify on the erroneous theory that she was her husband's agent, within Sec. 6359, R. S. 1909, when in fact, she was not such agent, is immaterial. *Insurance Co. v. Railroad*, 70.
9. **Failure to Prosecute Appeal: Dismissal of Appeal.** In an action in three counts, the finding was for defendant on two counts and for plaintiff on the other, and both parties appealed. Defendant filed an abstract of the record on its appeal, and plaintiff filed a supplemental abstract, setting out the verdict and reciting that he filed a motion for a new trial, which was overruled, and was granted an appeal. He also filed a "motion for leave to assign cross-errors." These were the only documents filed by him in the appellate court. *Held*, that plaintiff did not prosecute his cross-appeal, in compliance with the statutes and rules of the court, and that it should, therefore, be dismissed. *Realty Co. v. Railroad*, 83.
10. **Matters Reviewable.** Where an element of damages counted on is withdrawn from the consideration of the jury by an instruction given at defendant's request, and plaintiff does not appeal, such matter is not before the appellate court for consideration, on defendant's appeal. *Howell v. Railroad*, 92.
11. **Erroneous Theory of Damages: Disposition of Case on Appeal.** In an action against a carrier for breach of a contract of carriage where the trial court erroneously permitted a recovery for certain elements of damages, the appellate court *ordered* that the judgment be reversed and the cause remanded with directions to the trial court to ascertain the amount of damages, if any, that plaintiff was entitled to recover on the elements of damages for which a recovery could be had, and to enter judgment therefor. Ib.
12. **Abstract: Record Proper.** An abstract of the record proper should show the case was tried, a judgment was rendered, and for what it was and for whom it was. *Smith v. Russell*, 324.
13. **Motion for New Trial: Four Days: Court: Statute.** The abstract of the record proper failed to show the filing of a motion for new trial at the term of trial, or within four days. This was a fatal defect. It did show that the motion was filed "in the time allowed by the court," but the statute fixes the time and such statement does not show a proper filing. Ib.
14. **Record: Bill of Exceptions.** Showing matters belonging to the record proper, in the bill of exceptions will not cure the defect in the abstract. A bill of exceptions is allowed for showing matters of exception; and inserting things therein not belonging there, but which belong to the record proper, will not cure the failure to enter them in the latter place. Ib.
15. **Rule: Bill of Exceptions: Filing.** Notwithstanding the rule making unnecessary an abstract of record entries evidencing leave to file, or filing of, a bill of exceptions, it is yet necessary that the abstract of record proper should state that the bill was filed. Ib.

PRACTICE, APPELLATE—Continued.

16. **Abstract of Record:** **Bill of Exceptions:** **Allowance of Appeal.** Under Rule 26 of this court, adopted January 6, 1913, the abstract of record need not set out the record entries showing leave to file, or the filing of the bill of exceptions, or the various steps taken to perfect the appeal. Statements in the abstract of record that the bill of exceptions was duly filed and the appeal was duly taken will be sufficient in the absence of a record showing to the contrary. *Reidy v. Reidy*, 342.
17. **Rule 15: Default: Evidence.** The proper and efficient dispatch of business in the appellate court requires a reasonable compliance with Rule 15, and the court cannot allow violations thereof or encroachments thereon without inflicting the penalty provided for such violations. Affidavits filed to show excuse for failure to comply with such rule must affirmatively exclude every theory of the litigant's carelessness or blame for such failure. If all the affidavits say can be accepted as true and yet leave room for the negligence of the litigant to cause the failure, such affidavits are insufficient. *Ib.*
18. **Conclusiveness of Judgment.** In a case tried to the court, where no declarations of law were asked or given, a judgment for plaintiff will not be reversed if it can be sustained under any view of the evidence and reasonable inference therefrom. *Brix v. Fidelity Co.*, 518.
19. **Trial Practice: Demurrer to Evidence: Review.** The propriety of overruling a demurrer to the evidence is to be determined on a consideration of the evidence introduced by plaintiff. *Kettle-hake v. Foundry, Co.*, 528.
20. **Conclusiveness of Verdict.** A verdict rendered on conflicting evidence is conclusive on appeal. *Ib.*
21. **Trial Practice: Sufficiency of Objection to Evidence.** An objection to the introduction of evidence on the ground it is immaterial is too general to constitute a foundation for an assignment of error. *Ib.*
22. **Inadequacy of Relief to Respondent: Right of Appellant to Complain.** Where, under the issues, the verdict, if for the plaintiff, must be for a certain amount, and a verdict is rendered for a smaller amount, the defendant is entitled to have it set aside on appeal, although the plaintiff is willing to abide by it. *Witty v. Saling*, 574.
23. **Binding Effect of Supreme Court Decisions.** The Courts of Appeals are bound by the rulings of the Supreme Court. *Ib.*
24. **Review: Immaterial Matters.** Where, in a suit to foreclose a deed of trust, the *cestui que trust* was adjudged to be estopped from asserting his lien to the prejudice of rights acquired by grantees of the land and the court accordingly gave incumbrances paid by them priority over the deed of trust in the distribution of the proceeds of the sale, it was unnecessary to determine whether such incumbrances were junior or senior to the deed of trust, since the grantees' priority was predicated upon the estoppel. *Palmer v. Welch*, 580.
25. **Matters Affecting Respondent.** Where, in a suit to foreclose a deed of trust, the *cestui que trust* was adjudged to be estopped from asserting his lien to the prejudice of rights acquired by grantees of the land and the court accordingly gave incumbrances

PRACTICE, APPELLATE—Continued.

- paid by them priority over the deed of trust in the distribution of the proceeds of the sale, the *cestui que trust* could not be heard to complain, on appeal, that the court failed to grant the relief prayed for in the grantees' cross-bill, by reforming their deed, in which they assumed incumbrances on the land, so as to exclude the assumption of the deed of trust foreclosed, inasmuch as the grantees did not appeal from the decree and equity could be done without such reformation. Ib.
26. **Immaterial Matters.** Where, in a suit to foreclose a deed of trust, the *cestui que trust* was adjudged to be estopped from asserting his lien to the prejudice of rights acquired by grantees of the land and the court accordingly gave incumbrances paid by them priority over the deed of trust in the distribution of the proceeds of the sale, the *cestui que trust* could not be heard to complain, on appeal, that the court did not require them to account for crops and timber removed from the land prior to their purchase of it and while they were in possession of it as tenants, for which they had settled with their lessor. Ib.
27. **Controlling Decisions of Supreme Court.** The last previous ruling of the Supreme Court on any question of law or equity is controlling upon the Courts of Appeals, and it is their duty to follow it. Lumber Co. v. Realty Co., 614.
28. **Review of Matters of Exception: Prerequisites.** Where the abstract of the record does not show that an exception was preserved to the overruling of the motion for a new trial, the appellate court will not review the evidence or the finding and judgment thereon. Recar v. Recar, 632.
29. **Conclusiveness of Finding.** Where the evidence on an issue of negligence is such that different minds might disagree, the finding of the trial court will not be disturbed, on appeal. Dings v. Pullman Co., 643.
30. **Maintenance: Review.** In a suit by a wife for maintenance, the evidence will be reviewed, on appeal, according to the rule obtaining in equitable actions, and the judgment will be affirmed or reversed as the exigencies of the case may require; but where the evidence is highly conflicting, the appellate court will usually defer to the finding of the trial judge. Arste v. Arste, 649.
31. **Equity Cases: Review.** While it is the duty of an appellate court to weigh the testimony in an equity case and determine the matter on its own conclusions derived therefrom, irrespective of the findings of the trial court, nevertheless, in arriving at a determination, it will pay great deference to such findings. Veney v. Furth, 678.
32. **Review: Matters not Presented Below.** An objection that the evidence does not respond to the issues or is not admissible under the petition cannot, under the statute, be raised for the first time on appeal. Ib.
33. **Objections to Questions: Trial Practice.** An objection to a question which is not made until after the answer is given is too late and will not be considered on appeal unless the record shows that the witness answered so quickly and that there was no time to object. Peperkorn v. Transfer Co., 709.

PRACTICE, TRIAL.

1. **Appellate Practice: Argument of Counsel: Invited Error.** In an action by an insurance company on an assigned claim for damages from fire alleged to have been set out by defendant, where the attorney for defendant stated to the jury that plaintiff should not be allowed to recover more than the amount of insurance it had paid its assignor, defendant will not be heard to complain of a statement by plaintiff's attorney in reply that, though plaintiff had only paid a certain amount, it had to come into court and suffer delay and expense, especially in view of the fact that the damages allowed were not excessive. *Insurance Co. v. Railroad*, 70.
2. **Appellate Practice: Objection to Line of Evidence.** Where an objection to evidence is made and an exception is saved to the overruling of the objection, it is unnecessary to object to the same character of testimony subsequently introduced. *Kettle-hake v. Foundry Co.*, 528.
3. **Demurrer to Evidence: Rules of Decision.** In determining whether or not a demurrer to the evidence should be sustained, the evidence must be considered in the light most favorable to plaintiff. *Hodges v. Chambers*, 563.

PROHIBITION, WRIT OF.

Prohibiting Circuit Court: Jurisdiction of Courts of Appeals. The courts of appeals have jurisdiction of a proceeding by prohibition to prevent a circuit court from undertaking to exercise jurisdiction of an appeal from an order of a probate court granting a new trial in an *inquisition de lunatico*. *State ex rel v. McQuillan*, 106.

PROXIMATE CAUSE. See **Railroads**.**PUBLIC POLICY.**

How Determined. The public policy of the State is determined by its laws. *State ex rel. v. Hitcheock*, 109.

QUO WARRANTO.

Forfeiture of Corporation's Charter. Information was filed against respondent corporation to forfeit its franchise, alleging a perversion and misuse of said franchise. Respondent's answer denied the allegations. A commissioner was appointed, the evidence was taken and the commissioner made his report. Thereafter respondent filed application to withdraw its answer and at the same time filed written consent to the forfeiture of its charter. The application is allowed, the answer withdrawn and the charter is forfeited. *State v. Athletic Club*, 244.

RAILROADS.

1. **Fires: Sufficiency of Evidence.** In an action against a railroad company for damages from a fire alleged to have been set by one of its engines, circumstantial evidence held to warrant a finding that the fire was started by a spark from defendant's engine. *Insurance v. Railroad*, 70.
2. **Carriers: Warning Signals Required: Statute Examined.** Sec. 3140, R. S. 1909, requiring a bell to be placed on all locomotive engines to be rung at least 80 rods from public crossings and kept ringing

RAILROADS—Continued.

- until it shall cross the road, or that a steam whistle be attached to the engine and shall be sounded and kept sounding at intervals for that distance, is examined as to its applicability to interurban cars propelled by electricity, and authorities *pro* and *con* are cited. *Jackson v. Railroad*, 430.
3. **Crossings: Traveler's Duty Continuous: Dependent on Circumstances.** The duty of a traveler approaching a railroad crossing to use reasonable care to ascertain the approach of a train in dangerous proximity, is a continuous duty. Yet no fixed standard can be set up to govern in all cases; and to determine whether or not the injured person was guilty of contributory negligence the method of travel of such person must be considered, also the speed at which he was traveling as well as the speed of the train and whether or not his view was obstructed. *Ib.*
4. **Failure to Give Crossing Signals: Proximate. Cause.** The requirement of Sec. 3140, R. S. 1909, with respect to the giving of signals by a railroad train eighty rods from a crossing, is for the purpose of warning persons approaching the crossing of the presence of the train, and, therefore, if a person knows of the presence of a train, the warning so required would be without office and the failure to give it would not be the proximate cause of an injury resulting from such person being struck by the train. *Dudley v. Railroad*, 652.
5. **Same.** The negligence of the father of a little girl, riding with him, in driving in front of a railroad train, when he saw it in time to avoid it, cannot be said to be the sole cause of her injury, so as to free the railroad company from liability to her, as a joint tort-feasor, for not giving the crossing signals required by Sec. 3140, R. S. 1909, where it can be inferred that she might have saved herself from injury if the signals had been given. *Ib.*
6. **Action for Death from Backing Train: Violation of Municipal Ordinance.** In an action for the death of a person run over in a chute by a backing railroad train, evidence held to warrant a finding that the space between the top of the car farthest from the engine and the top of the chute was sufficient to make it practicable for a brakeman to ride on the top of that car, as required by Sec. 1857, Rev. Code of the City of St. Louis, which provides that a brakeman shall be on such car to give warning, etc. *Peper-korn v. Transfer Co.*, 709.
7. **Warning.** Ordinary care demands that a railroad company backing a train through a long dark chute, so placed as to invite persons to walk in it, should keep a lookout, and, if not practicable to have a man ride on the car farthest from the engine, to have one precede the train, to give warning of its approach. *Ib.*
8. **Violation of Municipal Ordinance.** In an action for the death of a person run over in a chute by a backing railroad train, evidence held to show that the train was not manned with experienced brakemen at their posts, so stationed as to see and hear danger signals, as required by Sec. 1857, Rev. Code of the City of St. Louis. *Ib.*
9. **Substantial Compliance: Instructions.** In an action for the death of a person run over in a chute by a backing railroad train, the court charged the jury at the instance of defendant that if they found that the act of sending a brakeman through the chute was for the purpose of complying with Sec. 1857, Rev. Code of the City of St.

RAILROADS—Continued.

- Louis (providing that, when trains are being backed within the city, a brakeman shall ride on top of the last car farthest from the engine to give warning etc., and if the jury found that such act was a substantial compliance with the ordinance, their verdict should be for the defendant. *Held*, that while the propriety of giving the instruction will not be determined, nevertheless it having been given at defendant's instance, defendant is concluded as to the issues it submitted, by the verdict of the jury. Ib.)
10. **Proximate Cause.** In an action for the death of a person run over in a chute by a backing railroad train, evidence *held* sufficient to show that the cause of death was defendant's failure to observe Sec. 1857, Rev. Code of the City of St. Louis, which provides that trains backing within the city shall have a man on the car farthest from the engine to give warning, etc. Ib.)
 11. **Sufficiency of Evidence.** In an action for the death of a person alleged to have been run over by a particular railroad train, which backed into a chute, it was shown that decedent's body was found under a car in the chute, one leg having been severed from his body and carried a distance of 60 ft. from the place where the body rested and in the direction in which the train moved, that blood and shreds of clothing were found on the forward trucks and wheels of the forward car of the train, and that no other train passed through the chute that night. *Held*, that the evidence was sufficient to show that deceased was killed by the particular train alleged. Ib.)
 12. **Backing Train: Municipal Ordinance: Applicability.** Sec. 1857 of the Rev. Code of the City of St. Louis, providing that a brakeman shall be stationed on the car farthest from the engine of a backing train, and that certain warnings shall be given, etc., covers a switch track which runs through a long, low chute. Ib.)
 13. **Action for Death from Backing Train: Violation of Municipal Ordinances: Instructions.** In an action for the death of a person run over in a chute by a backing railroad train, an instruction given for plaintiff, submitting as a predicate of recovery a violation of Sec. 1857 of the Rev. Code of the City of St. Louis, which provides that when a train is backed within the city, a brakeman shall be stationed on the car farthest from the engine to give warning, etc., and that the train shall be well manned with experienced brakemen at their posts, so stationed as to see and hear signals, etc., *held* to be free from error. Ib.)

REAL ESTATE AGENTS AND BROKERS.

1. **Right to Commissions.** Where a real estate broker is the procuring cause of a sale which was made directly to his customer by the owner, he is entitled to his commission, and neither the fact that he did not communicate to his principal the name of his customer nor the fact that the property was sold for a less amount than he was authorized to sell it for, would defeat his right thereto. *Lane v. Cunningham*, 17.
2. **Action for Commissions: Case for Jury.** In an action by a real estate broker for commissions in connection with the sale of a building, whether the broker was the procuring cause of the sale *held*, under the evidence, for the jury. Ib.)
3. **Action for Commission: Pleading: Variance.** In an action by a real estate broker for a commission for procuring a customer ready, willing and able to make an exchange of real estate pursuant to

REAL ESTATE AGENTS AND BROKERS—Continued.

- defendant's terms, *held* that there was no material variance between the contract for the exchange, which was pleaded in the petition according to its general tenor and legal effect, and the contract introduced in evidence, which entered into the details of the transaction much more fully than was set out in the petition. *Johnson v. Building Co.*, 543.
4. **Sufficiency of Evidence.** In an action by a real estate broker for a commission for procuring a customer ready, able and willing to make an exchange of real estate in accordance with defendant's terms, evidence *held* to support a verdict for plaintiff. Ib.
5. **Failure of Wife to Sign Contract: Estoppel.** In an action by a real estate broker for a commission for procuring a customer ready, able and willing to make an exchange of real estate pursuant to defendant's terms, defendant could not defeat plaintiff's right of recovery by showing that the customer's wife did not sign the contract for the exchange, where, at the time the negotiations were terminated, such objection was not made and the refusal to consummate the exchange was placed upon other grounds. Ib.
6. **Verbal Contract with Customer.** In an action by a real estate broker for a commission for procuring a customer ready, able and willing to make an exchange of real estate pursuant to defendant's terms, it is not a prerequisite to a recovery that the customer enter into a written contract for the exchange, but it is sufficient if plaintiff procured a customer who was ready, able and willing to make the exchange on the terms proposed by defendant. Ib.
7. **Variation in Terms: Estoppel.** In an action by a real estate broker for a commission for procuring a customer ready, able and willing to make an exchange of real estate pursuant to defendant's terms, defendant could not defeat plaintiff's right of recovery on the ground that there was a mortgage on the real estate of the customer procured by plaintiff where, at the time the negotiations were terminated, such objection was not made and the refusal to consummate the transaction was placed upon entire different grounds, Ib.
8. **Same.** In an action by a real estate broker for a commission for procuring a customer ready, able and willing to make an exchange of real estate pursuant to defendant's terms, where it was shown that defendant at first insisted that he would not take in exchange real estate which was subject to a mortgage, but that he subsequently agreed to do so, and plaintiff then procured a customer who was ready, able and willing to make an exchange, subject to a mortgage, plaintiff's right to a commission could not be defeated by reason of the encumbrance. Ib.
9. **Right to Commission.** A real estate broker in order to recover a commission for negotiating an exchange of real estate, which his principal refused to consummate, must show full performance of his obligations under the agency contract. *Duncan v. Turner*, 661.
10. **Defenses: Fraud.** Fraudulent misrepresentations made by a real estate broker to induce his principal to enter into a contract to exchange real estate, which was afterwards repudiated by the latter, constitute a defense to an action by the broker for a commission. Ib.

REAL ESTATE AGENTS AND BROKERS—Continued.

11. **Right to Commission.** A real estate broker is entitled to a commission for procuring a purchaser for land, when he produces one who is ready, willing, and able to buy on his principal's terms, although the latter refuses to consummate the sale. Ib.
12. **Same.** The negotiation, by a real estate broker, of a contract of sale or exchange of real property with a responsible person and on his principal's terms, which contract can be enforced by the latter, is equivalent to the production of a purchaser, and entitles the broker to a commission. Ib.
13. **Same.** A contract to pay a real estate broker five per cent commission for procuring a purchaser for real estate entitles him to a commission of that amount for procuring a customer with whom the principal contracts for an exchange of properties, especially where the principal, in employing the broker, stated that she would exchange her land for other property. Ib.
14. **Right to Commission.** The fact that a sale effected by a real estate broker does not conform to his original authority does not prevent the recovery of a commission by him, if the sale was ratified by his principal or conformed to modified authority.
15. **Fraud of Agent: Negligence of Principal.** Where the owner of farm land was induced by a real estate broker, with whom she had listed her land for sale or exchange, to enter into an exchange contract for four city houses, by false statements as to the condition of three (which, at his suggestion, she refrained from examining) as to the time when a deed of trust on them fell due, and that the alley behind them was a private one and not subject to be improved by the city at the expense of abutting owners, the broker could not recover a commission on his client's refusal to carry out the contract, inasmuch as, because of the confidential relation existing between them, she was entitled to rely on his representations; and this is true although the truth was discoverable on proper inquiry by her. Ib.
16. **Action for Commission: Fraud: Questions for Jury.** In an action by a real estate broker for a commission for negotiating a contract for the exchange of real estate between defendant and another, which contract defendant refused to carry out, defended on the ground that defendant was induced to enter into the contract by means of fraudulent misrepresentations on the part of plaintiff, *held*, under the evidence that the case was one for the jury. Ib.
17. **Counterclaim: Instructions.** In an action by a real estate broker for a commission for negotiating a contract for the exchange of real estate between defendant and another, defendant filed a counterclaim alleging that she was induced to execute the contract through plaintiff's fraudulent misrepresentations; that, upon learning of the fraud, she repudiated the contract, but that plaintiff nevertheless recorded it, and that, in order to remove the cloud upon her title created by it, she incurred expense, for which she prayed judgment. The evidence showed that there were defects in plaintiff's customer's title and that these had not been cured at the time stipulated for the exchange, but that the customer was moving toward that end at the time, and the contract provided that he should have a reasonable time to cure defects. The court charged that, although no fraud was committed, yet if the jury found that the requirements of the contract were not complied with by plaintiff's customer until after the time for so doing had elapsed, and that thereafter defendant notified plaintiff

REAL ESTATE AGENTS AND BROKERS—Continued.

that she would not proceed under the contract, but he nevertheless thereafter recorded it, and in order to remove the cloud upon her title created by it she incurred expense, she was entitled to recover under her counterclaim. *Held*, that the instruction was erroneous in permitting a recovery under the counterclaim even though no fraud was committed by plaintiff, since, under the evidence, that was the only ground upon which a recovery could be had; that it was also erroneous in so far as it assumed that the failure of plaintiff's customer to clear his title by the fixed time entitled defendant to cancel the contract, when the contract gave the parties a reasonable time after such date in which to perfect title; and that it was erroneous in so far as it assumed that it was an actionable wrong for plaintiff to record the contract after receiving notice that defendant had repudiated it, even though it was a valid contract. *Ib.*

RECORDING INSTRUMENTS.

Fraudulent Recording: Right of Recovery. The recording of a contract affecting real estate will not give rise to a cause of action unless it was recorded by one who, without authority, purported to represent the owner, or unless the contract was procured from the owner through fraud. *Duncan v. Turner*, 661.

REMOVAL OF CAUSES.

Diversity of Citizenship: Taking Non-suit as to Resident Defendant. In an action against a foreign corporation and two individual defendants, residents of this State, where plaintiff took an involuntary nonsuit as to the two individual defendants, *held* that the court did not err in overruling a petition for the removal of the cause to the United States District Court, filed by the foreign corporation defendant; following *Kansas City Suburban Belt Ry. Co. v. Herman*, 187 U. S. 63. *Kettlehake v. Foundry Co.*, 528.

ROADS AND HIGHWAYS.

Establishment by County Court: Failure to Open in Specified Time: Excuse for. Defendant was ordered by the county court to open a private roadway across his premises. Plaintiff seeks to recover penalty provided for in Sec. 10454, R. S. 1909, because of the alleged failure of the defendant to open the roadway within the specified time. The evidence is examined and reviewed and *held* to warrant the trial court in finding that the defendant was honestly mistaken in believing that the time had not expired within which he was required to open the roadway and that the misunderstanding concerning the time was not the fault of the defendant and that a penalty should not be inflicted upon him for the default. *Sullivan v. Kirkpatrick*, 233.

SALES. See Contracts.

1. **Delivery of Possession: Evidence Reviewed.** Suit for alleged conversion of lumber. One R conveyed to plaintiff by warranty deed certain land on which said lumber had been piled at various places, but the deed was not recorded for a considerable length of time and R remained in possession of the land and lumber. Defendant claims to have bought the lumber from R and R so testified. Plaintiff contends that the title to the lumber passed to him along with the title to the land under the warranty deed. The evidence is examined and reviewed and it is *held* that the question as to whether or not the lumber in controversy was a part of the real estate is a mixed question of law and fact; and the

SALES—Continued.

trial court having found that the lumber was not a part of the real estate, but was personal property sold by R. to plaintiffs, and *yet* having rendered judgment for defendant, the appellate court must conclude that the trial court found that there was no such change of possession as would relieve the transaction between plaintiffs and R from the provisions of Sec. 2887, R. S. 1909, which provides that a sale of goods and chattels shall be void as against subsequent bona fide purchasers unless there is a delivery within a reasonable time; and that defendant purchased the lumber from R and acquired the title thereto as against the plaintiffs. *Crow v. Abernathy*, 227.

2. **Consideration: Sufficiency of.** Where it is agreed that a purchaser shall assume a certain indebtedness of the seller to a third party, and third party is released, such agreement constitutes a sufficient consideration for the sale. *Ib.*
3. **Part of Apples on Trees: Price: Segregation: Title: Loss.** Where one person sold to another all of the apples in his orchard which would grade first and second grade, at a certain price per barrel, the purchaser to pick and grade them in the future, and the apples were frozen before they were picked and separated, it was held that the title had not passed and the loss was the seller's. *Longsdorff v. Meyers*, 255.
4. **Appropriation: Future Measurement.** One may sell all the apples in his orchard at a certain price per barrel, to be picked in the future, and it will be an appropriation of them by the buyer and the property passes to him *in praesenti*. The fact that the amount of the purchase money is to be ascertained by future measurement does not prevent an immediate passing of the title. *Ib.*
5. **Separation: Setting Apart: Title.** Where personal property is a part of a general mass or lot and such part is sold, the title does not pass until the part has been separated and set apart for the purchaser. *Ib.*
6. **Assignment of Draft: Attachment: Ownership of Property.** A purchaser of corn, buying in Kansas and selling in Kansas City, Missouri, paid therefor by checks on a local bank and indorsed and delivered to the bank a draft on the consignee, together with the bill of lading issued by the railway over which the corn was shipped. The corn was refused by the consignee and was attached by a creditor of the purchaser and sold by the sheriff. The bank filed interplea claiming the proceeds. Held, that the bank was the owner of the corn and entitled to the proceeds. *Poor v. Franke*, 354.

SPECIFIC PERFORMANCE.

Oral Contract: Theory of Decree. A court of equity decrees specific performance in cases where an oral contract is partly performed, *not* on the theory of enforcing the oral contract. But the decree requires the defendant to do certain things, because his promises have caused the other party to change his position, and to do otherwise would permit the Statute of Frauds to be used as a cloak for fraud. *Sursa v. Cash*, 396.

STATUTES CITED AND CONSTRUED.**MISSOURI CONSTITUTION.****Article 6, Section 12, see page 244.****Session Acts.**

- Laws 1842, pp. 233, 841, see page 122.
 Laws 1881, p. 106, see page 116.
 Laws 1885, p. 154, see page 154.
 Laws 1887, pp. 257, 145, see pages 6, 117.
 Laws 1891, p. 70, see page 14.
 Laws 1895, p. 221, see page 57.
 Laws 1905, pp. 135, 136, 137, see pages 154, 533.
 Laws 1907, p. 252, see page 533.
 Laws 1909, p. 396, see pages 37, 82.
 Laws 1911, pp. 193, 194, see pages 347, 426.

Revised Statutes of 1825.**Section 2, p. 226, see page 122.****Revised Statutes of 1855.****Pages 647, 648, 649, see page 153.****Revised Statutes of 1889.**

- Article 2, Chapter 153, see page 117.
 Section 9694, see page 6.
 Section 2246, see page 14.
 Section 11263, see page 123.

Revised Statutes of 1899.

- Article 7, Chapter 22, see page 53.
 Article 11, Chapter 12, see page 89.
 Section 2864, see page 533.
 Section 2866, see page 533.

Revised Statutes of 1909.

- Article 9, Chapter 41, see page 53.
 Article 10, Chapter 33, see pages 90, 245.
 Section 349, see page 358.

Section 964, 965, see page 251.	4841, see page 40.
1847, see page 637.	5425, see page 533.
1848, see page 336.	5426, see page 139.
1912, see page 57.	5427, see page 140.
2048, see pages 323, 13.	5859, see page 298.
2093, see page 197.	5860, see page 298.
2097, see page 10.	6354, see page 28.
2098, see page 233.	6359, see page 78.
2119 see page 265.	6937 see page 365.
2258 see page 120.	7582 see page 416.
2259 see page 121.	7584 see page 417.
2261 see pages 114, 121, 122.	7828, see page 511.
2265, see page 120.	7842, see page 513.
2290, see page 120.	8061, see page 426.
2291, see page 120.	8213, see page 278.
2292, see page 120.	8217, see page 621.
2712, see page 123.	8220, see page 622.
2887, see page 233.	8228, see page 622.

STATUTES CITED AND CONSTRUED—Continued.

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| 3938, see page 186. | 8231, see page 622. |
| 3939, see pages 37, 82. | 8304, see page 527. |
| 4495, see page 347. | 9255, see page 299. |
| 4505, see page 425. | 10697, see page 124. |
| 4750, see page 373. | 11231, see page 118. |
| 4751, see page 373. | 11232, see pages 118, 122. |
| 4752, see page 373. | 11233, see page 118. |
| 4753, see page 373. | 11234, see page 118. |

STATUTES, CONSTRUCTION OF. See Automobiles.

1. **Rules for Construction.** Statutes are to be construed together, and in construing them, the courts should have the whole body of the law in mind, harmonizing the provisions of the several statutes, if possible, and endeavoring to arrive at the intent of the lawmakers. *State ex rel. v. Hitchcock*, 109.
2. **Statutory Construction.** Although a statute which is in derogation of the common law must be strictly construed, nevertheless it must be given such a construction as will effectuate the obvious intent and purpose of the lawmakers. *Hodges v. Chambers*, 564.

STATUTES, REPEAL OF.

Repeal by Implication. A statute will not be held to have been impliedly repealed by a subsequently enacted statute, if it be possible to reconcile them with each other. *State ex rel. v. Hitchcock*, 109.

STATUTE OF FRAUDS.

1. **Contracts Within: Exchange of Real and Personal Property.** An oral contract sought to effect an exchange of property, both real and personal. *Held*, to be within the Statute of Frauds. *Surra v. Cash*, 396.
2. **Remedy at Law, Invoked: Part Performance Not Applicable.** When the remedy sought is at law, the doctrine of part performance of a contract does not place it outside of the operation of the Statute of Frauds. *Ib.*
3. **Exchange of Land: Oral Contract.** In a contract for the exchange of land, where it is necessary that each party to the contract be bound in writing, a part performance of the contract on one side cannot be made the foundation of a suit at law for damages against the other party for a breach of an oral agreement. *Ib.*
4. **Contract Partly Within: Statute Applicable to Entire Contract.** Where part of a contract, which must be taken as an entirety, is within the Statute of Frauds, the whole contract must be governed by the statute. *Ib.*
5. **Oral Contract: Part Performance: Requisites.** The performance of a contract, which is merely auxiliary to the one sought to be enforced, is not sufficient part performance to take a parol contract out of the Statute of Frauds. *Ib.*
6. **Memorandum of Contract for Sale of Land: Deed in Escrow or Undelivered.** An undelivered deed, or a deed delivered in escrow, is not a sufficient memorandum of a contract of sale of land to take it out of the Statute of Frauds. *Ib.*

STATUTE OF FRAUDS—Continued.

7. **Estoppel in Pais: Contract Non-enforceable.** There being no evidence that defendant induced the plaintiff to make the oral contract for the exchange of property with a fraudulent intent not to carry it out, the principle of estoppel *in pais* could not be invoked against the defendant, because the very contract with which he is charged with having failed to perform is non-enforceable under the statute. Ib.
8. **Answering for Another's Debt: Extension of Credit to Third Party.** F and son, who operated a sawmill, the product of which defendants purchased, being desirous of procuring feed on credit from plaintiffs, the latter wrote to defendants that they would not let F and son have feed on their own account, but would do so "provided we may send you an O. K.'d bill the first of each month and receive our remittance from you by the 10th," in answer to which defendants wrote to plaintiffs that F and son had requested them to deduct from the purchase price of the lumber "such amounts as may be owing for current feed bills and pay the same to you direct." "I must, however, have approved bills from you by the 5th of each month and I can remit to you on or before the 10th." *Held*, that it was proper to construe the letters as extending credit, in the first instance, to defendants, and not to F and son, so that the Statute of Frauds (Sec. 2783, R. S. 1909), requiring a promise to answer for the debt of another to be in writing, did not apply. Stokes v. Mills, 638.
9. **Same.** In determining whether a contract was one to answer for another's debt, within the Statute of Frauds (Sec. 2783, R. S. 1909), the test is to ascertain to whom the credit was given, and if the plaintiff dealt with the defendant alone, without giving credit to the person to whom the goods were furnished, the case is not within the statute. Ib.

STATUTE OF LIMITATIONS.

1. **Reducing Period of Limitation.** Inasmuch as statutes of limitation pertain to the remedy only, it is competent for the Legislature to reduce the period of limitation at any time, provided a reasonable time for the enforcement of existing rights is afforded. Winkleman v. Levee District, 49.
2. **Action on Judgment: Statute Applicable.** The Act of 1895, p. 221 (Sec. 1912, R. S. 1909), which reduced the time for bringing action on judgments from twenty years to ten, does not apply to judgments rendered prior to its enactment, and an action on such a judgment is not barred until twenty years after its rendition, although, at the end of that period, more than ten years have elapsed since the time the act became effective. Ib.

STREET RAILWAYS.

1. **Signals of Warning: Crossings.** Persons operating an electric road and its cars are required, regardless of statute, to give at roadway crossings effective and timely warnings, commensurate with the speed and danger likely to result from running the cars. Jackson v. Railroad, 430.
2. **Crossings: Duty of Traveler: Contributory Negligence.** A railroad is in and of itself a warning of danger and it is the duty of a traveler crossing same to look and listen for coming trains, and failure to do so is negligence *per se* contributing to any injury received by him, and in such case no amount of negligence on the part of the defendant will warrant a recovery. Ib.

STREET RAILWAYS—Continued.

3. **Crossings: Traveler's Rights and Duties.** A traveler approaching a railroad crossing has a right to presume that the railroad company will run its cars at a lawful rate of speed and that timely signals will be given as the car approaches the crossing. Yet he is not permitted to rely on such presumption to the extent that he may neglect his own duty in using care to look and listen for the approach of such car. Ib.
4. **Crossings: Care Required of Traveler.** A traveler approaching a railroad crossing is only required to use ordinary care to look and listen for approaching cars. Ib.
5. **Injury by Collision: Contributory Negligence.** In an action against a street railroad company for personal injuries occasioned by a collision at a street crossing between one of the defendant's cars and a motor cycle on which plaintiff was riding, the evidence relative to plaintiff's contributory negligence is examined and reviewed. *Held*, that the trial court properly refused to direct the verdict for the defendant on that ground. Ib.

SUFFICIENCY OF EVIDENCE. See Electricity.**TAX BILLS.**

1. **Pleading: Allegations.** A petition, in an action on taxbills, which alleges the facts required by the statute (Sec. 9296, R. S. R. S. 1909), is sufficient. *Fellows v. Dorsey*, 289.
2. **Preliminary Resolution.** The preliminary resolution declaring it necessary that certain streets of a city of the third class should be paved, should substantially inform the public of the kind and character of improvement intended, otherwise the proceedings and taxbills will be invalid. Ib.
3. **Resolution: Publication.** A preliminary resolution for a public improvement published in a daily paper from June 27th to, and including, July 6th, except on June 28th, July 4th and 5th, is in full compliance with the requirements of Sec. 9255, R. S. 1909. Ib.
4. **Contracts: Delegation of Power by City Council.** A contract for street improvement which leaves to the determination of the city engineer the time when the work should begin is not invalid. Such a provision is not an attempt by the city council to delegate a legislative duty to the engineer. Ib.
5. **Variance Between Ordinance and Resolution: Contractor.** Where a preliminary resolution for a public improvement provides that the gutter shall be grouted without further specifications, it is left to the council to provide the specifications; and if the specifications in the ordinance were faulty, the contractor is not at fault. Ib.
6. **Instructions: Definitions: Sand.** An instruction, which undertakes to instruct the jury as to the meaning of the word "sand" as used in a contract for street improvement, is not erroneous. Ib.
7. **Instructions: Custom and Usage.** Upon rehearing it was *held* that the instruction given for plaintiff, which told the jury that if they believed the word "sand" meant sand that would go through a 20 sieve, then the contract has been complied with, was erroneous, there being no evidence that a 20 sieve would separate sand from gravel, while on the contrary there was evidence that it was not a proper sieve for this purpose. Ib.

TELEGRAPH AND TELEPHONES.

1. **Penalty for Failure to Transmit: Message to Point Outside of State.** Where the contract to send the message was made in this State, and the failure to transmit promptly also occurred in this State, the fact that the message was addressed to a point outside the State will not render the statute, Sec. 3330, R. S. Mo. 1909, inapplicable, because, under such circumstances, its enforcement does not involve giving the statute extraterritorial force, nor is it a regulation of or limitation on interstate commerce. *Adcox v. Telegraph Co.*, 331.
2. **Application of Statute.** The statute, section 3330, is a penal one and must be strictly construed. By its terms it applies only "upon payment or tender of the usual charges" and where the message was, at the request of the sender, sent "collect," there can be no recovery of the penalty. Before the penalty can be exacted there must be either an actual payment or actual tender of the charges. *Ib.*
3. **Tender of Charges.** A tender is an unconditional offer to pay. An announced willingness to pay on condition that the telegram cannot be accepted upon any other terms is not sufficient. The facts in this case reviewed and held to show no tender was made. There was no refusal on the agent's part to accept the money, merely a consent to send the telegram on the terms requested by the sender. If the latter wanted the company to send the telegram at its peril with reference to the penalty, he should have paid the charges or actually tendered them. *Ib.*
4. **Delay in Transmitting Message: Damages.** Delay under such circumstances would render the company liable to damages but not to the penalty. *Ib.*

VERDICT.

Responsiveness to Issues: Amount of Recovery: Pleading: Variance. In an action to recover a specified amount for the performance of services, in accordance with the stipulations of an express contract, where defendant denied that he was bound by the contract or owed plaintiff anything, a verdict in favor of plaintiff for less than the stipulated amount cannot stand, and the fact that the verdict might be for the proper amount under a theory developed by defendant's evidence would not alter the situation, since the petition did not count nor was the case submitted, on any such theory. *Witty v. Saling*, 574.

WAIVER. See **Fraternal Beneficiary Associations.**

Definition. A waiver is the intentional abandonment or relinquishment of a known right, and the intention to do so, is the essential element involved. *Brix v. Fidelity Co.*, 518.

WARRANTY. See **Fraternal Beneficiary Associations.**

WIFE ABANDONMENT. See **Criminal Law.**

WILLS.

Contest Concerning: Title to Real Estate Involved: Jurisdiction in Supreme Court. In a suit concerning a will, neither the pleadings nor judgment contained any intimation that real estate was involved in the cause appealed. The bill of exceptions contained evidence indicating that certain real estate was owned by the

WILLS—Continued.

testator at the time of his death, which was disposed of by the will. *Held*, that the appeal involved title to real estate within the meaning of Art. 6, Sec. 12 of the Constitution and the cause should be transferred to the Supreme Court under Sec. 3938, R. S. 1909. *Bingaman v. Hannah*, 186.

WITNESSES. See Instructions.

1. **Competency: Death of Agent of Corporation: Competency of Survivor to Transaction.** In an action against a corporation for damages resulting from an assault committed by one of its servants, the plaintiff is disqualified from testifying under section 6354, Revised Statutes 1909, concerning what was said and done by the servant where, at the time of the trial, the servant is dead. *Leavea v. Railroad*, 24.
2. **Death of Party to Transaction: Construction of Statute.** In applying section 6354, Revised Statutes 1909, effect should be given to its spirit as well as its letter. *Ib.*
3. **Actions Ex Delicto.** Section 6354, Revised Statutes 1909, applies to actions *ex delicto* as well as to actions *ex contractu*. *Ib.*
4. The disability of the surviving party to testify, under section 6354, Revised Statutes 1909, where the other party to the cause of action in issue and on trial is dead, is coextensive with every occasion where such cause of action may be called in question. *Ib.*
5. **Competency of Wife: Agent of Husband.** A wife is not a competent witness for her husband, in an action by him for damages to his dwelling from a fire alleged to have been set out by defendant, on the theory that, having been left in charge of the premises by him, she was his "agent," within Sec. 6359, R. S. 1909. *Insurance Co. v. Railroad*, 70.
6. **Husband Party in Interest.** Sec. 6359, R. S. 1909, which provides that a wife may, in certain instances, testify in an action in the name of or against her husband, is an enabling statute, grafting exceptions upon the common law, and unless she comes within them, she is not competent to testify when her husband is a party in interest, whether a party to the action or not. *Ib.*
7. **Establishing Agency of Spouse: Competency of Husband or Wife.** A husband or wife is a competent witness to prove the agency of the other. *Ib.*
8. **Expert Witnesses: Qualifications.** A witness testifying as an expert as to whether or not the engineer who operated the defendant's engine and derrick to hoist and move logs had had sufficient experience should show that he is qualified to speak in relation thereto. But it is not necessary for the witness to have knowledge of that identical engine and appliance provided the engine and appliance, with the working of which he is acquainted, should be so similar that a person having knowledge of the one would necessarily have knowledge of the other. *Allen v. Lumber Co.*, 492.

Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—Hearing of Causes. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—Taking Records from Clerk's Office. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—Diminution of Records. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—Notices of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Review of Instructions on General Statement of Evidence. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court. If the opposite party shall

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contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—Evidence—Bill of Exceptions to be Allowed, When. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—Exceptions—Questions to be Embodied in Bill. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—Duty of Circuit Court Clerks in Making Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (e. g.): "Summons issued on the _____ day of _____, 188____, executed on the _____ day of _____, 188____;" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—Bill of Exceptions in Equity Cases. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—Abstract and Briefs to be Filed and Served. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions

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presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—Citing Authorities in Briefs. In compliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side-paging shall be set forth. The respondent, in his statement, may adopt that of appellant; or, if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

RULE 17.—Appellant's Brief to Allege Errors Complained of. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—Penalty for Failure to Comply with Rule 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

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RULE 19.—Agreed Statement of the Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—Motion for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—Motion for Affirmance. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—Extending Time for Filing Statement, Abstracts, Etc. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—Oral Arguments. When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him, and will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will thereupon make his statement and answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and in such cases the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—Notice on Motion to Dismiss or Affirm. A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

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RULE 25.—When Appeal is Returnable—Certificate of Judgment—Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal and *not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

RULE 26.—Record Entries Perfecting Appeal not to Be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then, absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be true, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

(Adopted, January 6, 1913.)

Rules of Practice in the St. Louis Court of Appeals.

REVISED JULY 20, 1909.

TO BE IN FORCE AUGUST 15, 1909.

Rule 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court Room.

Rule 2.—Words Appellant and Respondent, What They Include. Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

Rule 3.—Motions. All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

Rule 4.—Hearing of Causes. Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

Rule 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

Rule 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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Rule 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Rule 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

Rule 10.—Duty of the Clerk in Making Up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the _____ day of _____ 190____, executed on the _____ day of _____, 190____;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served. In those cases where the appellant shall, under the provisions of section 813, Revised Statutes of 1899, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstracts above referred to and of any

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objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

Rule 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

Rule 14.—Abstracts—When Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the endorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 813, Revised Statutes 1899, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for

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the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

Rule 17.—Costs, When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

Rule 18.—Briefs, What to Contain and When Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Rule 19.—Citing Authorities in Brief. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

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Authorities incorrectly cited as to book, page or title of case, will be disregarded.

Rule 20.—Extension of Time. Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

Rule 21.—Penalty for Failure to Comply With Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

Rule 22.—Agreed Statement of Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

Rule 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. See *Barnett et al. v. Colonial Hotel B. Co.*, 119 S. W. 471; 137 Mo. App. 636.

Rule 24 is hereby amended to read as follows:

Rule 24—Oral Arguments. When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, and if he has not consumed all of his time in opening. The whole time consumed by either party in statement and argument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided further*, that in appeals in causes originating before a Justice of the Peace, the time for argument shall not exceed thirty (30) minutes on each side.

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Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court *in extenso* the written or printed argument on file, nor from reports or text books.

The above rule to be in force and effect on and after June 6, 1910.

Rule 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

Rule 26.—Motion for Affirmance. On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Rule 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 28.—Allowance to Garnishees. Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

Rule 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attor-

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ney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

Rule 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

Rule 31.—Withdrawing Records. No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

Rule 32.—Repeal of Former Rules. All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

Rule 33.—In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.

Rule 34. An appellant having filed a certified copy of the order granting an appeal,

(a) Need not abstract the record entries showing the steps taken in the trial court to perfect such appeal. If the abstract

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states that the appeal was duly taken, then, absent a certified transcript of the record showing to the contrary, it will be presumed that the proper steps were taken at the proper time and term.

(b) No appellant or plaintiff in error need abstract record entries evidencing his leave to file or various extensions of time granted for filing, a bill of exceptions, but it will be sufficient if his abstract states that the bill of exceptions was duly filed.

The burden, in either of the above paragraphs a or b, will then be upon the respondent or, in writs of error, upon defendant in error, to produce in this court a transcript of the record, or of as much thereof as is necessary, duly certified by the clerk of the trial court, showing the contrary to be the fact, if he make the point.

(c) When the respondent or defendant in error desires to challenge the abstract of the record for any of the above defects, he shall give notice in writing to the opposite counsel, which notice shall be served upon such counsel within ten days after the abstract has been served, failing which, no such objection will be entertained. Such notice, shall, at least five days after service thereof, be filed with the clerk of this court, together with certified transcript of record above required.

[Adopted December 14, 1912.]

RULES OF PRACTICE IN THE SPRINGFIELD COURT OF APPEALS.

Adopted August 19, 1909.

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the court room.

RULE 2.—Words Appellant and Respondent, what they include. Whenever the word appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

RULE 3.—Motions. All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

RULE 4.—Hearing of Causes. Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

RULE 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

RULE 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove.

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then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

RULE 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

RULE 10.—Duty of the Clerk in Making up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 190—, executed on the — day of — 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

RULE 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule, and dispense with the necessity of any further transcript.

RULE 14.—Abstracts, when Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty

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days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

RULE 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the question and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Provided: In all cases wherein there are statements or other evidence in the printed abstracts of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal, and any statement that the bill of exceptions was signed, sealed or made a part of the record will be taken to be a statement that said bill of exceptions was signed, sealed and filed and made a part of the record at the proper time and in the proper manner, such abstracts shall be deemed sufficient as to any of the aforesaid matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be a sufficient objection to state that the abstract does not show such steps were taken in proper time or in a proper manner, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time or in proper manner, as the case may be, and thereupon, the Court shall determine the matter and the costs thereof shall be taxed as the Court shall deem just. (Amended January 3, 1911, to take effect February 1, 1911.)

RULE 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2043, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

RULE 17.—Costs, when Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 2048, Revised Statutes 1909, which fails to make a full presentation of all the record nec-

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essary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

RULE 18.—Briefs, what to Contain and when Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

RULE 19.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

RULE 20.—Continuing and Resetting Cases. No case shall be reset or continued, or time extended for filing statements, abstracts or briefs, on mere agreement of counsel, but only for sufficient cause shown, and by order of the court. (Effective December 1st, 1910.)

RULE 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard

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from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

RULE 22.—Agreed Statement or Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

RULE 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

RULE 24.—Oral Arguments. When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant in error replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the cause, shall otherwise order.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

RULE 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 26.—Motion for Affirmance. On motion for affirmation under section 2047, Revised Statutes 1909, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

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RULE 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 28.—Allowance to Garnishees.—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

RULE 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney, shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

RULE 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

RULE 31.—Withdrawing Records. No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

RULE 32.—Record Entries Perfecting Appeal not to be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Anything in any rule to the contrary is hereby abrogated.
Adopted March 3, 1913

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